> may have a jury trial, unless a jury be waived, to determine the damages, which damages the owner may choose to accept in annual payments as may be provided for by law. Annual payments shall not be subject to escalator clauses but may be supplemented by interest earned.

North Dakota Century Code section 32-15-01(2) provides:

> 2. Private property shall not be taken or damaged for public use without just compensation first having been made to or paid into court for the owner. In case such property is so taken by a person, firm, private corporation, or limited liability company, no benefit to accrue from the proposed improvement shall be allowed in ascertaining the compensation to be made therefor. Such compensation in all cases shall be ascertained by a jury, unless a jury is waived. The right of eminent domain may be exercised in the manner provided in this chapter.

North Dakota Century Code section 32-15-23 provides:

> **32-15-23. When right to damages accrues.** For the purpose of assessing compensation and damages, the right thereto shall be deemed to have accrued at the date of the taking and its actual value at that date shall be the measure of compensation for all property actually to be taken, and the basis of damages to the property not actually taken, but

injuriously affected, in all cases when such damages are allowed as provided in section 32-15-22. The time of the taking shall be determined by the court.

STATEMENT OF THE CASE

Wild Rice River Estates, Inc., [hereafter, "Wild Rice"] is the owner and developer of a rural residential subdivision along the banks of the Wild Rice River located about three miles south of Fargo, North Dakota. The subdivision was platted in 1993 with 38 lots, and 16 of those lots are located on an oxbow of the river. Wild Rice was incorporated by Anton Rutten [now deceased] in 1994 for the purpose of developing the rural residential subdivision.

To develop the rural residential subdivision, Rutten and Wild Rice have invested approximately $500,000.00 for required sewer and water facilities, streets, and the promotion of the subdivision. When platted, the required flood elevation for lots within the subdivision was one foot above base flood elevation.

The Wild Rice River, similar to other rivers in North Dakota's Red River Valley, is prone to flooding. In April of 1997, following record breaking snowfalls, the Wild Rice River, and all of the Red River Valley, experienced a 100 plus year flood. All undeveloped lots in the subdivision were under water due to the April, 1997, flooding. The three homes then constructed in the subdivision experienced no flood damage, but a partially constructed home owned by Anton Rutten was damaged by water and "muck."

After the April, 1997, floods the City of Fargo began

working with Federal Emergency Management Agency ["FEMA"] to develop plans for future floods. On August 1, 1997, the subdivision was brought into the extraterritorial jurisdiction of the City of Fargo. On June 15, 1998, FEMA developed a preliminary flood insurance rate-map for the area and several lots in the subdivision were located within the preliminary floodway. The Wild Rice River did not have a mapped floodway before this time. The City of Fargo believed it would take about eighteen months for FEMA to finalize a flood plain map after the preliminary floodway was designated.

On August 10, 1998, the City of Fargo imposed a moratorium "on the issuance of all building permits for new construction in the floodway within the City of Fargo and its four-mile extraterritorial zone effective August 10, 1998, for a period until the Fargo City Ordinances have been passed and FEMA has made a final determination on their flood plain map." By October 5, 1998, the City of Fargo adopted the only ordinances that stemmed from or were related to the moratorium and those ordinances applied only to lands platted after October 5, 1998 – not Wild Rice's subdivision. The October, 1998, ordinances raised the required flood elevation to 2.5 feet over base flood elevations and increased the required setback from the floodway to100 feet from 10 feet. After October 5, 1998, there were no further studies as to the flood plain, and there has been no finalization of the flood plain map for Wild Rice's land or any other land.

After October 5, 1998, a major reason the City of Fargo continued the moratorium was to give the City of Fargo, working hand-in-hand with Cass County, North Dakota, time to explore acquisition of Wild Rice's land using FEMA funding. After October 5, 1998, the major purpose of

the moratorium was to stop development and thereby freeze the purchase price if the City of Fargo [or Cass County] obtained FEMA funds. As testified to by City Engineer Bittner, in response to questions by the attorney for the City of Fargo, "(T)his continued to be an ongoing process and we are attempting to use the best available information to prevent construction on properties that will ultimately require public money to get rid of." See, Appendix page 131. During the approximately 21-month period the moratorium was in effect, Fargo city officials participated in many meetings with state, local, and federal officials concerning flood plan mitigation issues and the possibility of obtaining either federal or state funding to purchase vacant lots in the flood prone areas. The City of Fargo's "top mitigation priority" was to acquire flood prone properties. See, Appendix page 133.

The City of Fargo maintained it continued the moratorium to maintain the status quo until the city, and other governmental bodies, could determine whether it was safe to build in flood prone areas. However, neither the City of Fargo, nor other governmental entities, made studies or passed rules or legislation after October 5, 1998, to make those determinations.

Wild Rice could not accomplish one sale of one lot during the twenty-one month period of the moratorium. During the moratorium, proposed sales were lost because they were contingent upon the purchaser obtaining building permits that were denied because of the moratorium. During the moratorium, twenty-two prospective purchasers had contacted Wild Rice but not one sale was accomplished after interested persons approached the City of Fargo. No one was interested in an actual purchase of a lot until the moratorium

was lifted. Prospective purchasers were not interested in purchasing if they could not obtain a building permit. Wild Rice was denied all economic beneficial uses of its land during the twenty-one month period of the moratorium. Neither the City of Fargo, nor any of the Courts below, could identify a single economically viable use of Wild Rice's land during the twenty-one month moratorium.

In the Spring of 1999, Wild Rice was denied a building permit to erect a speculation home solely due to the moratorium. Prior to litigation, Wild Rice's attempts to have the City of Fargo lift the moratorium failed or were ignored by the City of Fargo.

Wild Rice initiated an inverse condemnation action against the City of Fargo in late March, 2000, seeking just compensation for the taking. See, Appendix pages 56 through 69. Wild Rice's inverse condemnation action caused the City of Fargo to lift the moratorium on May 1, 2000 – twenty-one months after its inception. The City of Fargo's unannounced legal strategy was to lift the moratorium only if an affected landowner started litigation. See the summary of Fargo City Attorney Gary Stewart's legal position set forth in a committee meeting on November 19, 1999. See, Appendix page 132. After litigation began, the City of Fargo unsuccessfully continued to seek funding to acquire Wild Rice's land.

Once the moratorium was lifted, Wild Rice was able to accomplish sales of some of its lots. However, because the City of Fargo forced Wild Rice to initiate litigation to lift the moratorium, Wild Rice viewed its sales as attempts to mitigate its damages caused by the City of Fargo's moratorium. The twenty-one month moratorium obliterated

all economically viable use of Wild Rice's land during the moratorium, and also, Wild Rice's pre-moratorium promotional scheme. The ongoing litigation, forced upon Wild Rice by the City of Fargo so as to end the moratorium, necessarily put Wild Rice at a disadvantage in promoting its subdivision through trial.

Further, although the October 5, 1998, ordinances did not apply to Wild Rice's land, Wild Rice did not know that these ordinances did not apply to its land until disclosed by the City of Fargo at time of trial. The City of Fargo attempted to impose the greater standards upon Wild Rice when it sought a building permit for a speculation home in the Spring of 1999. Post-moratorium purchasers from Wild Rice were required to meet the greater restrictions imposed in October, 1998.

The City of Fargo prepared the Factual Findings and Conclusions of Law that were adopted verbatim by the District Court of Cass County, North Dakota. Appendix pages 31 and 49. Although factual findings adopted in this manner become the district court's findings, this Court should recognize that evidence and law important to Wild Rice can be overlooked or inadequately considered when findings and conclusions are mechanically adopted by a trial court. See, *Jones v. International Paper Company*, 720 F.2d 496, 499 (8th Cir. 1983). This process was condoned by the North Dakota Supreme Court.

REASONS FOR GRANTING THE WRIT

This Court has stated that regulatory-takings cases require "essentially ad hoc, factual inquiries," balancing all relevant circumstances to determine whether the government

has taken property. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, at 124-125. Two of these circumstances have been identified as especially important to determine if there has been a taking: (1) "[t]he economic impact on the claimant, and, particularly, the extent to which the [government] has interfered with distinct investment-backed expectations;" and (2) "the character of the governmental action." Id, at 124. See also, *Lingle v. Chevron U.S.A. Inc.*, 544 U.S.___, 125 S.Ct. 2074, 2081-2082 (2005).

This Court's guidance is necessary to clarify these factors when a major goal of a governmental body is to suppress development in anticipation of governmental acquisition. If not reviewed, the decision below will sharply restrict landowners' rights to obtain just compensation for moratoriums imposed to stall development to suppress purchase price for an anticipated governmental acquisition.

a. The character of the government action:

When addressing this factor, the Supreme Court of North Dakota relied upon the District Court's adopted conclusion that "city officials acted in good faith and with proper diligence concerning the moratorium." *Wild Rice River Estates, Inc. v. City of Fargo, supra.*, ¶ 26. Conclusions of Law of the District Court of Cass County, North Dakota, Appendix page 47. The Supreme Court of North Dakota's approach to this factor is nothing more than the discarded "substantially advances" inquiry. See, *Lingle v. Chevron U.S.A. Inc., supra.*, 125 S.Ct., at 2084. Under the Supreme Court of North Dakota's approach to this factor, there is no inquiry into the severity of the burden the moratorium imposed on Wild Rice's property rights.

Under the Supreme Court of North Dakota's approach to this factor, uncontroverted evidence that Wild Rice was forced to sue in order to lift the moratorium – by the City of Fargo's preconceived legal strategy – can be ignored. Under the Supreme Court of North Dakota's approach, uncontroverted evidence that a major purpose of the moratorium was to stall development with a view towards governmental acquisition for a lower price can be ignored. Under the Supreme Court of North Dakota's approach, instead of focusing on the burden that the moratorium placed upon Wild Rice's property rights, it becomes a means-end test. Under said means-end approach, if a governmental body can articulate any legitimate governmental objective, there will not be a taking even if a owner's property rights are eviscerated. Under the Supreme Court of North Dakota's approach, this *Penn-Central* factor merely becomes a test of "good faith" -- a discarded due process test and not a takings test. See, *Lingle v. Chevron U.S.A. Inc., supra.*, 125 S.Ct., at 2083. The Supreme Court of North Dakota re-establishes a discarded due process test under a different guise.

The proper inquiry, under this factor, should focus on what burden the moratorium placed upon the claimant – as an individual – in reference to his property rights. The focus should not be on the "good faith" of government officials but on the extent that governmental regulation interfered with an individual's property rights. See, *Lingle v. Chevron U.S.A. Inc., supra.*, 125 S.Ct., at 2084.

Conversely, a governmental abuse of its zoning powers can lead to a compensable Fifth Amendment taking if the property owner is deprived of any economically viable use for his land. *Kaiser Development Company v. City and Count of Honolulu*, 913 F.2d 573 (C.A.9 1990). Stalling

development to freeze the potential purchase price does not serve a legitimate public purpose, and should be considered a compensable taking under the Fifth Amendment and Fourteenth Amendment. See *Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 119 S. Ct. 1624, 143 L. Ed.2d 882 (1999).

As was stated in *State ex rel. Tingley v. Gurda*, 243 N.W. 317, 320 (Wis. 1932):

> The zoning power is one which may be used to the great benefit and advantage of a city, but, * * * it is a power which may be greatly abused if it is to be used as a means to depress the values of property which the city may upon some future occasion desire to take under the power of eminent domain. Such a use of the power is utterly unreasonable, and cannot be sanctioned.

As was stated in *Hermanson v Board of County Commissioners of the County of Freemont*, 594 P.2d 694, 695-696 (Colo. App. 1979):

> While it is true that the use of property may be regulated by valid exercise of the police power, if the regulation goes beyond protection of the public health, safety, morals, and welfare it amounts to a confiscation or taking and is subject to the constitutional mandate requiring payment of just compensation. Therefore, regulations designed to depress value with a view to future acquisition may form the basis of a

> cause of action for compensation on the theory of inverse condemnation against the public entity initiating the regulation. See, e. g., *People ex rel. Department of Public Works v. Southern Pacific Transportation Co.*, 33 Cal.App.3d 960, 109 Cal.Rptr. 525 (1973).

See also, *People ex rel. Department of Public Works v. Southern Pacific Transportation Co.*, 33 Cal.App.3d 960, 109 Cal.Rptr. 525 (1973); *Wital Corp. v. Township of Denville*, 93 N.J.Super. 107, 225 A.2d 139 (1966); and *Carl M. Freeman Assocs., Inc. v. State Roads Common*, 252 Md. 319, 250 A.2d 250, 255 (1969).

The twenty-one month moratorium obliterated all economically viable use of Wild Rice's land during the moratorium. A major purpose for imposing the moratorium and continuing it beyond October 5, 1998, was to suppress development in anticipation of governmental acquisition of Wild Rice's land. Under the factual circumstances of this case, the governmental regulation went too far and there was a taking of Wild Rice's property. Governmental bodies should not be allowed to invoke the word "moratorium" masking its bad faith with impunity.

b. Economic impact on Wild Rice.

The Supreme Court of North Dakota cites two cases as authority for the following statement in *Wild Rice River Estates, Inc. v. City of Fargo*, 2005 ND 193, ¶ 25, 705 N.W.2d 850:

> [¶ 25] Moreover, courts have said the focus of the economic impact criterion is the change

> in fair market value of the subject property caused by the regulatory imposition measured by comparing the market value of the property immediately before the governmental action with the market value of the same property immediately after the action is terminated. *See, e.g., Cane Tennessee, Inc. V. United States*, 57 Fed.Cl. 115, 123 (Fed.Cl.2003); *Leon County v. Gluesenkamp;* 873 So.2d 460, 467 (Fla.App.2004).

The Supreme Court of North Dakota's error is that neither cited case has made such statement – the last two (2) words ["is terminated"] were added that significantly change the meaning of the legal concepts advanced by shifting from an immediate time of comparison [the impact existing before the moratorium as compared to one moment thereafter] to two (2) different periods of time, twenty-one months separated – ignoring the impact upon the landowner during the hiatus.

Wild Rice's land had no value upon passage of the moratorium – there is no evidence that the property had any economic viable use during the duration of the moratorium of nearly twenty-one months. It could not be farmed, nor even used as pasture. It could not be sold, and it could not be developed for nearly twenty-one months while the City of Fargo waited for FEMA monies or the initiation of legal action by adversely impacted landowner(s) – the triggering event the City of Fargo would use to terminate the moratorium adversely affecting Wild Rice, and others.

The Supreme Court of North Dakota added two words

["is terminated"] at the end of the language originally set forth in *Cane Tennessee, Inc. v. United States*, 57 Fed.Cl. 115, 123 (Fed.CL.2003):

> The court believes that the proper measure of economic impact is a comparison of the market value of the property immediately before the governmental action with the market value of that same property immediately after the action. *See Keystone*, 480 U.S. at 497, 107 S.Ct. 1232.

Likewise, the other cited case, *Leon County v. Gluesenkamp*, 873 So.2d 460, 467 (Fla.App.2004) does not have the two extra words ["is terminated"] which improperly shifted the point of comparison to a date twenty-one months later:

> With respect to the *Penn Central* economic impact criterion, a plaintiff must establish "'a serious financial loss from the regulatory imposition.'" (cases cited) The focus of this factor is on the change in fair market value of the subject property caused by the regulatory imposition. *Id.* In other words, the court must compare the value that has been taken from the property with the value that remains in the property. *Id.* (citing *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987)); *see also Cane Tenn., Inc. v. United States*, 57 Fed. Cl. 115, 123 (Fed.Cl.2003)(holding that the proper measure of economic impact is a comparison

> of the market value of the property immediately before the governmental action with that same property immediately after the action).

The Supreme Court of North Dakota's decision suggests no harm has occurred because "Wild Rice sold more lots at higher prices after the moratorium was lifted than it did before the moratorium became effective. The most recent lot sale reflected in the record was for $59,900, more than double the $24,000 Wild Rice received for a lot in 1994." *Wild Rice River Estates, Inc. v. City of Fargo*, 2005 ND 193, ¶ 25, 705 N.W.2d 850.

Adding the two words ["is terminated"] suggests that the initial action of the City of Fargo [creating a moratorium] somehow postpones any consideration of an inverse condemnation action until after the moratorium is terminated, at which time a comparison in prices shall occur; and apparently, if the price of land goes up – no harm, no foul.

However, neither cited case includes the two added words, nor the judicial concept that would compress time and make different date(s) possibly synonymous: either August 10, 1998 [moratorium created] or October 5, 1998 [inapplicable ordinances passed], synonymous with May 1, 2000 [moratorium terminated].

Nor does *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987), the authority for both *Cane Tennessee* and *Leon County*, render passage of time meaningless [even a ten year moratorium would be totally excused if the price of land goes up] by including the two extra words.

Under the Supreme of North Dakota's decision, the economic circumstances of a claimant during the duration of a moratorium is not considered by a reviewing court. Under the Supreme Court of North Dakota's decision, the financial impact to a claimant during the duration of an ongoing moratorium is not a factor to be taken into consideration.

The Petitioner respectfully submits that to properly consider the financial impact a moratorium may have on a claimant, the economic circumstances during the period of the moratorium must be considered. The Supreme Court of the United States should not allow the invocation of a moratorium to be a governmental license to openly and notoriously take the property of landowners without just compensation.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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701-293-7211

No. _____

IN THE

Supreme Court of the United States

Wild Rice River Estates, Inc.,

Petitioner,

v.

City of Fargo, a North Dakota municipal corporation,

Respondent.

On Petition For Writ of Certiorari
To The Supreme Court of North Dakota

Appendix to Petition for Writ of Certiorari

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Filed Nov. 14, 2005
IN THE SUPREME COURT
STATE OF NORTH DAKOTA

2005 ND 193

Wild Rice River Estates, Inc., Plaintiff and Appellant
v.
City of Fargo, a municipal corporation, Defendant and Appellee.

No. 20050074

Appeal from the District Court of Cass County, Est Central Judicial District, the Honorable Douglas R. Herman, Judge.

AFFIRMED.

Opinion of the Court by VandeWalle, Chief Justice.

Jonathan T. Garaas, Garaas Law firm, DeMores Office Park, 1314 23rd Street South, Fargo, ND 58103-3796, for plaintiff and appellant.

Patricia A. Roscoe (argued) and Garylle B. Stewart (appeared), Solberg, Stewart, Miller & Tjon, P. O. Box 1897, Fargo, N.D. 58107-1897, for defendant and appellee.

Wild Rice River Estates, Inc., v. City of Fargo

No. 20050074

VANDE WALLE, Chief Justice.

[¶ 1] Wild Rice River Estates, Inc. ("Wild Rice"), appealed from a judgment dismissing its inverse condemnation action against the city of Fargo and from an order denying its post-trial motions. We conclude the trial court correctly ruled that Fargo's 21-month moratorium on building permits did not constitute a taking of Wild Rice's property in violation of the federal and state constitutions, and we affirm.

I

[¶ 2] Wild Rice is the owner and developer of a rural residential subdivision along the banks of the Wild Rice River located about three miles south of Fargo. Wild Rice was owned by Anton Rutten, who acquired the farmland in 1947. Rutten anticipated that the property would one day become a part of Fargo, and he hoped to develop a subdivision on the property when the city grew. The subdivision was platted in 1993 with 38 lots, and 16 of those lots are located on an oxbow of the river. Wild Rice was incorporated in 1994 for the purpose of developing the subdivision. Because of county and township regulations, Wild Rice was required to construct at its expense a connection to the local sanitary sewer system operated by Southeast Cass Water Resource District. Fargo and Wild Rice entered into a 10-year agreement for the city to treat the sewage collected from the development, and Wild Rice installed sewer and water services for 14 of the lots. At the time of the platting, the required flood elevation for lots in Wild Rice was one foot above base floor elevation. Wild Rice sold the first lot in the development in 1994 for $24,000 and Rutten purchased a lot in 1996 or 1997. In the meantime, Wild Rice invested approximately $500,000 to develop and

promote the subdivision.

[¶ 3] The Red River Valley, including the Wild Rice River, has a long and significant history of flooding. A bridge that once connected a road to the oxbow of the Wild Rice River where lots are currently located was removed in 1989 because of flood damage. During the April 1997 flood, all undeveloped lots in Wild Rice were under water. The homes then existing at the subdivision were not under water, but the partially constructed Rutten home was damaged by water and "muck."

[¶ 4] After the 1997 flood, Fargo began working with the Federal Emergency Management Agency ("FEMA") to plan for future floods, and on August 1, 1997, Fargo brought the Wild Rice subdivision into its extraterritorial jurisdiction. On June 15, 1998, FEMA developed a preliminary flood insurance rate-map for the area and several Wild Rice lots were located within the preliminary floodway. The Wild Rice River did not have a mapped floodway before this time, and city officials believed the FEMA designation for the river would be formalized in about 18 months. On August 10, 1998, the Fargo City Commission decided that a "moratorium be placed on the issuance of all building permits for new construction in the floodway within the City of Fargo and its four-mile extraterritorial zone effective August 10, 1998 for a period until the Fargo City Ordinances have been passed and FEMA has made a final determination on their flood plain map." Although several of Wild Rice's lots were affected by the moratorium, others were not affected. During the approximately 21-month period the moratorium was in effect, Fargo city officials participated in many meetings with local, state and federal officials concerning flood plan mitigation issues.

[¶ 5] In May 1999, Anton Rutten's daughter, Bonnie Rutten, applied for a building permit to construct a home on one of the lots in Wild Rice, but the permit was denied because the lot was located within the area identified by FEMA in the preliminary designated floodway covered by the moratorium. During the moratorium, some buyers showed interest in purchasing Wild Rice lots and several people contacted Wild Rice for information. One potential buyer signed two purchase agreements and another signed a lot-hold agreement, but no lots were sold. Wild Rice repeatedly attempted to persuade Fargo to lift the moratorium and issue permits for construction, but the city refused.

[¶ 6] Wild Rice brought this inverse condemnation and tortious interference action on March 30, 2000, and Fargo filed its answer on April 21, 2000. On April 27, 2000, the Fargo city engineer wrote to the city commissioners and recommended that the building permit moratorium be lifted and the city adopt FEMA's June 15, 1998 preliminary flood insurance rate-map panel as the governing panel for all flood-prone areas. Following a public hearing, the city commission voted to lift the moratorium on May 1, 2000.

[¶ 7] After the moratorium was lifted, Wild Rice sold five lots. The party who signed a purchase agreement during the moratorium purchased a lot in May 2000 for $32,900. Lots were also purchased in March 2002 for $39,000, in November 2002 for $39,000, in July 2003 for $55,900, and in April 2004 for $59,900. Other sales were pending at the time of these proceedings.

[¶ 8] Following a bench trial, the trial court ruled in favor of Fargo, concluding there had been no "taking" of Wild Rice's property and no malicious interference with third-party

contract rights. The court also denied Wild Rice's post-trial motions.

II

[¶ 9] Wild Rice does not challenge the trial court's dismissal of its claim for malicious interference with third-party contract rights, but asserts the court erred in dismissing its claim for inverse condemnation because Fargo's 21-month moratorium constituted a "taking" of its property.

[1][2] [¶ 10] Whether there has been a taking of private property for public use is a question of law which is fully reviewable on appeal, *Braunagel v. City of Devils Lake*, 2001 ND 118, ¶ 16, 629 N.W.2d 567, but we will not set aside a trial court's findings of fact on a takings claim unless they are clearly erroneous under N.D.R.Civ.P. 52(a). *Minch v. City of Fargo*, 332 N.W.2d 71, 73 (N.D.1983). A finding of fact is clearly erroneous when, although there is some evidence to support it, the reviewing court is left with a definite and firm conviction a mistake has been made. *Buri v. Ramsey*, 2005 ND 65, ¶ 13, 693 N.W.2d 619.

[¶ 11] Because Wild Rice challenges the moratorium as a taking of its property under both the federal and state constitutions, it is appropriate to outline takings jurisprudence under the respective constitutional provisions.

A

[3] [¶ 12] The Fifth Amendment to the United States Constitution guarantees that private property shall not "be taken for public use, without just compensation." U.S. Const. Amend. V. The takings clause of the Fifth Amendment is made applicable to the states through the Fourteenth Amendment. *See Ripley v. City of Lincoln*, 330 N.W.2d 505,

507 n. 1 (N.D.1983).

[4][5][6][7][8] [¶ 13] In *Lingle v. Chevron U.S.A. Inc.*, --- U.S. ----, ----, 125 S.Ct. 2074, 2082, 161 L.Ed.2d 876 (2005), the United States Supreme Court recently disavowed the "stand-alone" regulatory takings test announced in *Agins v. City of Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980), that " '[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests.' " In doing so, the Court summarized the remaining valid rules that govern its takings clause jurisprudence. The Court identified two categories of regulatory action that generally will be deemed per se takings: "First, where government requires an owner to suffer a permanent physical invasion of her property--however minor--it must provide just compensation." *Id.* at 2081. Compensation is required for physical takings, "however minimal the economic costs [they] entail[ ]," because they "eviscerate[ ] the owner's right to exclude others from entering and using her property--perhaps the most fundamental of all property interests." *Id.* at 2082. "A second categorical rule applies to regulations that completely deprive an owner of *'all* economically beneficial us[e]' of her property." *Id.* at 2081 (quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992)). The complete elimination of a property's value is the determinative factor in this category because the total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation. *Lingle*, 125 S.Ct. at 2082. "Outside these two relatively narrow categories," regulatory taking challenges are governed by the standards set forth in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978).

Lingle, 125 S.Ct. at 2081. These standards are "designed to allow 'careful examination and weighing of all the relevant circumstances.' " *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002) (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 636, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001) (O'Connor, J. concurring)). The primary *Penn Central* factors are " '[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations,' " and the " 'character of the governmental action'--for instance whether it amounts to a physical invasion or instead merely affects property interests through 'some public program adjusting the benefits and burdens of economic life to promote the common good.' " *Lingle*, 125 S.Ct. at 2081-82 (quoting *Penn Central*, 438 U.S. at 124, 98 S.Ct. 2646). The "*Penn Central* inquiry turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests." *Lingle*, 125 S.Ct. at 2082.

[¶ 14] The United States Supreme Court has addressed whether a moratorium on land development imposed during a government agency's process of devising a comprehensive land-use plan constitutes a per se taking of property requiring compensation under the takings clause of the Fifth Amendment. The Court's decision in *Tahoe-Sierra*, 535 U.S. 302, 306, 122 S.Ct. 1465, 152 L.Ed.2d 517, involved two moratoria that prohibited virtually all development on property for a 32-month period in an effort to maintain the status quo while the government agency studied the impact of development on Lake Tahoe and designed a strategy for environmentally sound growth. The Court rejected the argument that a temporary deprivation of all economically

viable use compels a finding that a categorical taking has occurred under *Lucas*. The court explained:

> An interest in real property is defined by the metes and bounds that describe its geographic dimensions and the term of years that describes the temporal aspect of the owner's interest. See Restatement of Property §§ 7-9 (1936). Both dimensions must be considered if the interest is to be viewed in its entirety. Hence, a permanent deprivation of the owner's use of the entire area is a taking of "the parcel as a whole," whereas a temporary restriction that merely causes a diminution in value is not. Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted. Cf. *Agins v. City of Tiburon*, 447 U.S., at 263, n. 9, 100 S.Ct. 2138 ("Even if the appellants' ability to sell their property was limited during the pendency of the condemnation proceeding, the appellants were free to sell or develop their property when the proceedings ended. Mere fluctuations in value during the process of governmental decision making, absent extraordinary delay, are 'incidents of ownership. They cannot be considered as a "taking" in the constitutional sense' " (quoting *Danforth v. United States*, 308 U.S. 271, 285, 60 S.Ct. 231, 84 L.Ed. 240 (1939))).
>
> *Id.* at 331-32, 122 S.Ct. 1465.

[¶ 15] The Supreme Court in *Tahoe-Sierra* also rejected a proposed per se rule that any moratorium lasting more than one year is constitutionally unacceptable. The Court acknowledged "[i]t may well be true that any moratorium that lasts for more than one year should be viewed with special skepticism" and "the duration of the restriction is one of the important factors that a court must consider in the appraisal

of a regulatory takings claim," but concluded "the interest in 'fairness and justice' will be best served by relying on the familiar *Penn Central* approach when deciding cases like this, rather than by attempting to craft a new categorical rule." *Tahoe-Sierra*, 535 U.S. at 341-42, 122 S.Ct. 1465.

B

[9] [¶ 16] Under N.D. Const. art. I, § 16, "[p]rivate property shall not be taken or damaged for public use without just compensation." This Court has said our state constitutional provision is broader in some respects than its federal counterpart because the state provision " 'was intended to secure to owners, not only the possession of property, but also those rights which render possession valuable.' " *Grand Forks-Traill Water Users, Inc. v. Hjelle*, 413 N.W.2d 344, 346 (N.D.1987) (quoting *Donaldson v. City of Bismarck*, 71 N.D. 592, 3 N.W.2d 808 Syll. ¶ 1 (1942)). Nevertheless, this Court has looked to both state and federal precedents in construing takings claims under the state constitution, *see, e.g., Southeast Cass Water Res. Dist. v. Burlington N. R.R. Co.*, 527 N.W.2d 884, 890 (N.D.1995), and our cases on inverse condemnation under the state constitution bear some similarities to the federal analysis.

[10][11][12][13] [¶ 17] In *Braunagel*, 2001 ND 118, ¶ 16, 629 N.W.2d 567, this Court summarized its jurisprudence on regulatory takings:

> [T]he City, acting through its police powers, has broad authority to enact land-use regulations without compensating the landowner for the restrictions placed upon use of the property. *Grand Forks-Traill Water Users, Inc. v. Hjelle*, 413 N.W.2d 344, 346 (N.D.1987); *Rippley v. City of Lincoln*, 330 N.W.2d 505, 507 (N.D.1983); *Kraft v. Malone*, 313 N.W.2d 758, 761 (N.D.1981), *overruled on*

other grounds by Shark v. Thompson, 373 N.W.2d 859 (N.D.1985); *Eck v. City of Bismarck*, 283 N.W.2d 193, 197 (N.D.1979). A zoning ordinance does not constitute a taking of property for public use merely because it diminishes the value of the regulated property or disallows the best and highest use of the property. *Grand Forks-Traill*, at 346; *Rippley*, at 507; *Eck*, at 197. Governmental regulation constitutes a taking for public use only when it deprives the owner of all or substantially all reasonable uses of the property. *Grand Forks-Traill*, at 346; *Rippley*, at 507; *Kraft*, at 761.

This Court has also adopted the parcel-as-a-whole rule, relying upon *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987) (quoting *Penn Central*, 438 U.S. at 130-31, 98 S.Ct. 2646), for the proposition that "[i]n determining whether a restriction constitutes a taking, courts look to the effect of the restriction on the parcel of land as a whole, rather than to the effect on individual interests in the land." *Hjelle*, 413 N.W.2d at 346. The Supreme Court stated in *Penn Central*, 438 U.S. at 124, 98 S.Ct. 2646, that it, "quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government." We have also observed that "[c]lear guidelines are similarly absent from the variety of precedents pronounced by this court." *Minch v. City of Fargo*, 332 N.W.2d 71, 73 (N.D.1983).

[14] [¶ 18] Wild Rice argues the 21-month moratorium constituted a per se categorical taking of its property because the moratorium denied it all economically viable use of the property. Wild Rice relies on the Supreme Court's statement in *Lucas*, 505 U.S. at 1019, 112 S.Ct. 2886 (footnote

omitted), that "when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking."

[¶ 19] The Supreme Court's decision in *Tahoe-Sierra* disposes of Wild Rice's claim that *Lucas* controls this case. *Lucas* involved a permanent, rather than a temporary taking. The Court stated the *Lucas* "holding that the permanent 'obliteration of the value' of a fee simple estate constitutes a categorical taking does not answer the question whether a regulation prohibiting any economic use of land for a 32-month period has the same legal effect." *Tahoe-Sierra*, 535 U.S. at 330-31, 122 S.Ct. 1465. The Court said "the categorical rule in *Lucas* was carved out for the 'extraordinary case' in which a regulation permanently deprives property of all value; the default rule remains that, in the regulatory taking context, we require a more fact specific inquiry." *Id.* at 332, 122 S.Ct. 1465.

[¶ 20] We conclude that the moratorium did not constitute a per se categorical taking of Wild Rice's property under the federal and state constitutions.

D

[15] [¶ 21] Wild Rice argues the moratorium constituted a taking under the Supreme Court's *Penn Central* analysis. Under *Penn Central*, 438 U.S. at 124, 98 S.Ct. 2646, the particularly significant factors a court must consider are: 1) the "economic impact of the regulation on the claimant"; 2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and 3) "the character of the governmental action."

[¶ 22] Wild Rice contends the evidence supports a conclusion that a taking has occurred. There was evidence of economic impact on the claimant, according to Wild Rice, because of the nearly $500,000 it invested in the property between 1992 and 1999, most of which was mandated by governmental entities that required a public sewer system and road infrastructure for the development. Wild Rice also relies on the pending sales of lots that did not take place because potential purchasers were unable to obtain building permits. Wild Rice argues the moratorium interfered with its investment-backed expectations because of its inability to sell residential lots after investing $500,000 in the property. Wild Rice argues the governmental action in this case is characterized by bad faith, because the city conducted no reviews or studies to create new ordinances applicable to its property during the moratorium period and lifted the moratorium only after impacted landowners brought inverse condemnation actions. Wild Rice claims the moratorium was used by the city simply "to prevent construction on Wild Rice's previously platted real property during an unsuccessful attempt to secure Federal funding to purchase Wild Rice's real property at a lower price (a price without need for compensation for new construction)."

[¶ 23] However, in concluding Wild Rice had not established a taking under the *Penn Central* factors, the trial court reasoned:

> 12. [Wild Rice] retained economically viable use of its property during the moratorium. *Cf. Palazzolo v. Rhode Island*, 533 U.S. 606, 632, 121 S.Ct. 2448, 150 L.Ed.2d 592 (2001) (holding that reduction in developer's property from $3,150,000 to $200,000, due to a state coastal committee's refusal to allow development in costal area, did not amount to a deprivation of all economic value and therefore did not

amount to a total takings claim).

13. There is a huge disconnect between the fact of the history of [Wild Rice] development and its claim for compensation. Pre-moratorium sales were at the rate of ½ lot per year (the average lots sales for 1994 until July 1998). Rounding up 21 to 24 months, the loss was one (1) lost/delayed lot sale. At trial, loss on one of the riverside lots would be approximately $30,000 according to the Wild Rice River Estates brokers. A mere delay equals the sum of delayed investment opportunity ("interest") would be more in the nature of $3,000, a far cry from the one million dollars plus claimed by [Wild Rice]. Furthermore, "[m]ere fluctuations in value during the process of governmental decision-making, absent extraordinary delay, are incidents of ownership. They cannot be considered a taking in the constitutional sense." *Tahoe-Sierra*, 535 U.S. at 332, 122 S.Ct. 1465.

....

15. The moratorium did not single out Plaintiff's property. Rather, it applied to other developments as well and the City has not paid compensation to other developers similarly affected. *Cf. Tahoe-Sierra*, 535 U.S. at 340, 122 S.Ct. 1465 (stating that the need to protect planners' decisional process is stronger when developing a regional plan as opposed to considering a permit for a single parcel).

16. The moratorium was not an appropriation of [Wild Rice's] property for public use, but rather a temporary moratorium until local, State and Federal officials could adequately review a flood plain management for the area so devastated by the 1997 flood.

....

18. Fargo city officials acted in good faith and with proper diligence concerning the moratorium as part of an overall effort to maintain the status quo until flood planning efforts

and development could be re-evaluated after the devastating 1997 flood.

19. Fargo city officials were justified in waiting for FEMA's final adoption of a floodway for the Wild Rice River and other rivers in the Red River Valley.

20. The moratorium protected prospective buyers who might build on a river lot, not knowing, for example, that a home previously located on or next to the lot was damaged or destroyed by the 1997 flood.

21. Given the devastation and cost in damages caused by the flood, the City's moratorium was a reasonable, appropriate land-use regulation, issued in an effort to maintain the status quo of development in flood-prone areas until Fargo city officials and local, state and federal agencies had an opportunity to properly review and prepare an appropriate flood management plan for flood-prone areas within the City of Fargo's extraterritorial jurisdiction.

22. The City's moratorium bears a reasonable relationship to a legitimate governmental purpose; it is not arbitrary or capricious and does not amount to an unconstitutional taking of property requiring payment of just compensation.

[¶ 24] The trial court's factual findings are supported by the record. Although Wild Rice had originally projected sales of four lots per year, Wild Rice had difficulty selling any lots from the very beginning of its existence. Only one lot was sold to an outside party between 1994 and 1998 before the moratorium became effective, notwithstanding the assistance of a realtor experienced in river developments and a two-year tax exemption offer. Lots in Wild Rice were prone to flooding and all but two of the Wild Rice lots were covered by water during the 1997 flood. Additional flooding occurred in 2001. After the moratorium was lifted, prospective buyers expressed concerns about water and flood issues. As the trial court found, "[m]any factors" besides the

moratorium "affected [Wild Rice's] investment over the years." The evidence suggests Wild Rice's investment-backed expectations were unreasonable.

[¶ 25] Moreover, courts have said the focus of the economic impact criterion is the change in fair market value of the subject property caused by the regulatory imposition measured by comparing the market value of the property immediately before the governmental action with the market value of the same property immediately after the action is terminated. *See, e.g., Cane Tennessee, Inc. v. United States*, 57 Fed.Cl. 115, 123 (Fed.Cl.2003); *Leon County v. Gluesenkamp*, 873 So.2d 460, 467 (Fla.App.2004). Here, Wild Rice sold more lots at higher prices after the moratorium was lifted than it did before the moratorium became effective. The most recent lot sale reflected in the record was for $59,900, more than double the $24,000 Wild Rice received for a lot in 1994. Under these circumstances, it is far less likely that a compensable taking has occurred. *See Leon County*, 873 So.2d at 467 (no taking where landowners sold property for $500,000 profit after court-ordered moratorium on development was dissolved); *Condemnation By The Municipality of Penn Hills*, 870 A.2d 400, 409 (Pa.Cmwlth.2005) (no taking where 29-month injunction to suspend property development did not prevent landowners from gaining a reasonable return on their investment after injunction was dismissed).

[16][17] [¶ 26] An extraordinary delay in governmental decisionmaking coupled with bad faith on the part of the governmental body may result in a compensable taking of property. *See Bass Enter. Prod. Co. v. United States*, 381 F.3d 1360, 1366 (Fed.Cir.2004); *Wyatt v. United States*, 271 F.3d 1090, 1098 (Fed.Cir.2001); *Appolo Fuels, Inc. v.*

United States, 54 Fed.Cl. 717, 737 (Fed.Cl.2002); *Byrd v. City of Hartsville*, 365 S.C. 650, 620 S.E.2d 76, 2005 WL 2291782, *5 (2005). Fargo claimed it issued the moratorium in an effort to maintain the status quo until the city, along with other governmental bodies, could determine whether it was safe to build in flood prone areas. The moratorium applied to all land located within the preliminary designated floodway, not only to property owned by Wild Rice. According to Fargo, the city believed it was appropriate to wait for FEMA's final adoption of a floodway before building should continue. Although Wild Rice argues the city was simply keeping the value of its property deflated while waiting to secure federal funding to purchase the property, the trial court found that "city officials acted in good faith and with proper diligence concerning the moratorium." We apply the clearly erroneous standard to trial court determinations of good or bad faith. *See, e.g., Belfield Educ. Ass'n v. Belfield Pub. Sch. Dist.*, 496 N.W.2d 12, 14 (N.D.1993); *Corwin Chrysler-Plymouth, Inc. v. Westchester Fire Ins. Co.*, 279 N.W.2d 638, 644 (N.D.1979). In light of the evidence, the trial court's finding that the city acted in good faith is not clearly erroneous nor can we say the 21-month length of the moratorium was extraordinary under these circumstances.

[¶ 27] Wild Rice has failed to establish that the city's temporary moratorium resulted in an unconstitutional taking of Wild Rice's property under the *Penn Central* analysis. Wild Rice has not advanced a principled theory for modifying the *Penn Central* analysis for state constitutional purposes. We conclude no unconstitutional taking of Wild Rice's property has occurred under the federal and state constitutions.

E

[¶ 28] Wild Rice argues it is entitled to be compensated for Fargo's temporary taking of its property under principles announced by this Court in *Rippley*, 330 N.W.2d 505.

[¶ 29] *Rippley*, 330 N.W.2d at 506, involved a Lincoln city zoning ordinance that zoned for public use 20 acres of the Rippleys' property which previously had been zoned residential. The city intended to use the land in the future for construction of a school and other governmental operations, and after the city failed to commence eminent domain proceedings or otherwise offer to compensate the Rippleys for their land, they brought an inverse condemnation action. *Id.* The trial court dismissed the claim, concluding the city's action did not constitute a taking entitling the Rippleys to compensation. *Id.*

[18] [¶ 30] On appeal, this Court reversed, holding that by zoning the Rippleys' property for public use "Lincoln has deprived the Rippleys of all reasonable use of their property and has thereby accomplished a taking of the property for which just compensation is constitutionally required." *Rippley*, 330 N.W.2d at 509. The Court then turned to the issue of the proper remedy for the city's taking of the Rippleys' property through promulgation of the zoning ordinance and adopted Justice Brennan's view in *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 653, 101 S.Ct. 1287, 67 L.Ed.2d 551 (1981) (Brennan, J., dissenting) (footnotes omitted), that " 'once a court establishes that there was a regulatory "taking," the Constitution demands that the government entity pay just compensation for the period commencing on the date the regulation first effected the "taking," and ending on the date the government entity chooses to rescind or otherwise amend the regulation.' "

Rippley, 330 N.W.2d at 510. We concluded:

> If a landowner proves that governmental regulation has deprived him of all reasonable use of his property, he is entitled to receive just compensation. However, the landowner cannot force a permanent taking upon the governmental body if the taking is reversible and the government wants to halt the taking. Rather, under its police power authority, the governmental body can choose to rescind the ordinance or other regulation in which case it must compensate the landowner only for a temporary taking measured by the time period between the date the regulation took effect and the date it was rescinded. If, however, the governmental body chooses to retain the ordinance or other regulation the landowner is then entitled to compensation for a permanent taking of his property. Upon remand of this case for a determination of the damage issue, the City of Lincoln must inform the court of its intention to either rescind or to continue the "P Public Use" zoning upon the Rippley property. With that information, the court can hold further hearings to determine the appropriate measure of damages in accordance with the approach advanced by Justice Brennan in *San Diego, supra*, which we adopt in this case.
>
> *Rippley*, 330 N.W.2d at 511 (footnote omitted).

[¶ 31] Wild Rice argues it should have been allowed to assert a permanent taking of property by Fargo, because the city "did not properly plead 'abandonment of moratorium' as required by" this Court's decision in *Rippley*. Because Fargo's answer was filed before the city lifted the moratorium, the city did not allege that the moratorium had been terminated, and did not subsequently move to amend its answer to allege this fact. However, *Rippley* does not address pleading requirements for an inverse condemnation action.

The city alleged in its answer that the moratorium on the issuance of building permits was "temporary," and all parties ***861** were obviously aware that the moratorium had been terminated long before the trial began. Wild Rice's argument that the actual termination of the moratorium should be ignored under these circumstances is without merit.

[¶ 32] Wild Rice also asserts *Rippley* requires that, as a matter of law, Fargo pay it just compensation for the interim period between the enactment of the moratorium and the date the moratorium was lifted. But, the zoning ordinance in *Rippley* was essentially permanent in nature, rather than temporary. This Court said "Lincoln's zoning ordinance ... destroys all reasonable use of the Rippleys' property leaving the Rippleys at the mercy of Lincoln as to a future date, if ever, that the latter may be willing to purchase the property for construction of public facilities." *Rippley* 330 N.W.2d at 508 (footnote omitted). Moreover, in *Rippley* the city had accomplished a taking of the property. As a consequence, this Court held that once a taking of property has been established, the landowner cannot force upon the governmental body the remedy for a permanent taking of property if it should choose to halt the taking. *Id.* at 511. Under *Rippley*, the governmental body is given an opportunity to lessen the amount of compensation it must pay to the landowner by rescinding or correcting the regulation that caused the taking. Justice Brennan's proposed rule articulated in his dissent in *San Diego*, upon which this Court relied upon in *Rippley* and which the United States Supreme Court eventually endorsed in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315, 318, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987), only "addressed the separate remedial question of how compensation is measured once a regulatory taking is

established." *Tahoe-Sierra*, 535 U.S. at 328, 122 S.Ct. 1465. The Supreme Court in *Tahoe-Sierra*, 535 U.S. at 328, 122 S.Ct. 1465, specifically pointed out that *First English* did not address "the quite different and logically prior question whether the temporary regulation at issue had in fact constituted a taking."

[¶ 33] In this case, we have concluded the city's 21-month moratorium on issuing building permits did not constitute a taking of Wild Rice's property. The choice of remedies for an established taking of property provided in *Rippley*, 330 N.W.2d at 511, does not come into play under these circumstances. *Rippley* does not support Wild Rice's argument that a taking of its property has occurred under the state constitution.

III

[19][20] [¶ 34] Wild Rice argues the trial court erred in "prematurely" adopting Fargo's proposed findings, conclusions and order "without notice to Wild Rice" and in allowing the city to include in those findings and conclusions "facts and case law not originally determined by the trial court." Wild Rice's complaints about the "prematurely" adopted findings and conclusions were raised in its post-trial motions and were considered by the court when it denied those motions. Therefore, Wild Rice can show no prejudice resulted from the court's failure to allow Wild Rice a timely objection under N.D.R.Ct. 7.1(b). Moreover, "[w]hen the court affixes its signature to the findings, even though drafted by counsel, they become the findings of the court, and if they adequately explain the basis of the court's decision it will be upheld." *Schmidkunz v. Schmidkunz*, 529 N.W.2d 857, 858 (N.D.1995). Wild Rice's arguments are without merit.

IV

[¶ 35] We conclude Fargo's 21-month moratorium on building permits did not constitute a taking of Wild Rice's property under the federal and state constitutions. We have considered Wild Rice's other arguments and deem them to be either without merit or unnecessary to resolve in view of our disposition of this case. The judgment and the order denying Wild Rice's post-trial motions are affirmed.

[¶ 36] DALE V. SANDSTROM, CAROL RONNING KAPSNER, and MARY MUEHLEN MARING, JJ., and DONOVAN JOHN FOUGHTY, D.J., concur.

[¶ 37] The Honorable DONOVAN JOHN FOUGHTY, D.J., sitting in place of CROTHERS, J., disqualified.

IN DISTRICT COURT, COUNTY OF CASS,
STATE OF NORTH DAKOTA

Wild Rice River Estates,

Plaintiff,

File No. 09-02-C-00703

vs.

MEMORANDUM
City of Fargo, OPINION

Defendant.

NATURE OF PROCEEDINGS

This is an inverse condemnation proceeding, alleging a governmental taking in the form of a moratorium on residential construction in the floodways south of the City of Fargo. Plaintiff also alleges wrongful interference with contract.

The matter came on for hearing before the Court during the week of October 25, 2004. Six witnesses testified. One hundred seventy-two exhibits were received into evidence. The parties have submitted post-trial papers.

FACTS

Wild Rice River Estates

Plaintiff Wild Rice River Estates ("WWRE"(sic)) is

the owner/developer of a rural residential subdivision along the banks of the Wild Rice River 3.5 miles south of Fargo. The current subdivision was part of a 1947 rural land purchase by Anton Rutten, who maintained a farmstead nearby. It was always his hope - a hope now shared by his daughter, Bonnie – to develop a high-end subdivision as the City of Fargo moved south and west. Thirty-eight lots, including sixteen riverine lots, were platted in 1993. A condition of the plat required by Cass County was sewer service to be extended from the City of Fargo. Roughly $500,000 was invested from 1993 to 1998 in order to develop and promote the subdivision. Lot activity can be summarized as follows:

1993 Subdivision platted. Sewer service available in Lots 13 through 25.

1994 First sale. Lot 18.

1995 No lots sold.

1996 No lots sold. Anton and Frederica Ruttm begin construction on their own house on Lot 16.

1997 Historic 1997 flood. No lots sold.

1998 No lots sold. Building moratorium put in effect by City of Fargo.

1999 No lots sold. Moratorium on construction in effect.

2000 Moratorium lifted May 1, 2000. Lot 17 sold. 200. No lots sold.

2002 Two lots sold.

2003 One lot sold.

2004 One lot sold. Others pending.

After the moratorium, WRRE sold five lots as referenced above: Christopher Johnson purchased Lot 19 in March 2002 at a price of $39,000. See Exhibit 13. Marilyn Wold purchased Lot 21 in November 2002 at a price of $39,000. *See* Exhibit 12. John and Paula Grettum purchased Lot 22 in July of 2003 for a price of $55,900. *See* Exhibit 10. Dean and Joanne Hornbacher purchased Lot 20 in April of 2004 for a price of $59,900. *See* Exhibit 119. These prices were not discounted from the existing, listed and advertised prices.

Many lots within WRRE were not at all affected by the moratorium, in as much as they were out of the temporary designated flood plain. In other words, a buyer could have gotten a permit, and actually built a house on those lots during the 20-month moratorium. There was a transaction on one of these lots, specifically, a lot hold agreement for Lot 2, Block 1, on November 17, 1999 (during the moratorium). See Exhibit 17. Purchasers by the name of Steffens eventually cancelled the agreement on November 30, 2000, six months after the moratorium had been lifted.

Thus, at all times, WRRE was fully compliant with all City of Fargo and Cass County regulations. The subdivision remains a highly attractive residential development.

The 1997 Flood

The Red River Valley, flat as the proverbial "pancake" and lined with impervious clay soils, floods periodically, usually at April "ice-out". Recent flood years include 1969, 1978, 1979, 1984, 1985, 1989, 1997 and 2001. The 1997 flood followed a record-breaking snowfall winter and evolved into a 100-plus year event for communities from Wahpeton, North Dakota to Selkirk, Manitoba. At Fargo, just downstream of where the Wild Rice joins the Red River of the North, the water rose a vertical 22 feet above its banks. At the height of the flood, all undeveloped lots within the WRRE were under water. Only the fill under the three homes then-existing at Wild Rice River Estates kept these homes out of the water - and then barely so. Exhibit 165. It is difficult to over-emphasize the significance of the 1997 flood in this subsequent legal dispute.

The 1998 Building Moratorium

After the 1997 flood clean-up, the City of Fargo began working with the Federal Emergency Management Agency ("FEMA") to plan for future floods. There was not yet a formal "floodway" designated on the Wild Rice River, but one was anticipated. As the City considered a new construction moratorium within its floodways (including floodways within its four-mile extra-territorial area) it included the Wild Rice River, anticipating that the FEMA designation for the Wild Rice River would be formalized within eighteen months or so, according to Agency practice. The moratorium covering both the Wild Rice and the Red went into effect on August 11, 1998, following a Monday evening, August 10, 1998 City Commission meeting.

During the time the moratorium was in effect, Fargo city officials participated in many meetings with State, local and Federal officials concerning flood plan mitigation issues, specifically, issues regarding the moratorium. Exhibits 76, 78, 84-87, 94, 97-98, 100, 102,105,107-109,129, 160, 162-164 and 170. City Engineer Mark Bittner wrote to the Fargo City Commissioners on April 27, 2000, recommending, among other things, that the City terminate the building permit moratorium and adopt a preliminary flood insurance rate map ("FIRM") panel dated June 15, 1998 as the governing panel for all area flood-prone areas. Exhibit 102.

The moratorium was lifted on May 1, 2000. Although technically, Wild Rice River Estate lots could be sold, it is not disputed that actual building on lots within the preliminary designated floodway, i.e. Lots 13-25, could not have gone forward during this 21-month period for the single reason that no building pernit would issue.

APPLICABLE LAW

Leading "takings" cases under the Fifth and Fourteenth Amendments of the United States Constitution include Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l. Planning Agency, 535 U.S. 302 (2002); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) and Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978). ***See also*** GBT Pattnershiip v. City of Fargo 2001 WL 1820144 (D.N.D. 2001).

Leading "takings" cases under Article I, Section 16 of

the North Dakota Constitution and N.D.C.C. §32-15 include Boehm v. Backer, 493 N.W.2d 671 (N.D. 1992) and Grand Forks - Traill Water Users, Inc., v. Hjelle, 413 N.W.2d (N.D. 1987), appeal dismissed 484 U.S. 1053 (1988). To the extent that there is any conflict between the Federal cases and the State cases, the Court would follow the State cases where broader property rights appear to be protected under State law. Braunnagel v. City of Devils Lake 629 N.W.2d 567 (N.D. 2001); Grand Forks - Traill, supra.

Specifically, Article 1, Section 16 of the North Dakota Constitution states that "private property shall not be taken or damaged for public use without just compensation." There are two (2) forms of legal "takings". The first, physical occupation, "occurs when government encroaches upon or occupies private land for its own personal use." *See*, Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001). That type of physical occupation is inapplicable here. The second form of "taking" occurs "when government actions do not encroach upon or occupy the property yet still affect and limit its use to such an extent that a taking occurs." Palazzolo 533 U.S. at 617. Wild Rice River Estates alleges such a taking and that the moratorium was a taking under both Federal and State law.

In Penn Central, the Supreme Court aptly characterized the takings analysis as "essentially ad hoc factual inquiries" in which the Courts consider several factors: the economic impact of the regulation on the claimant; the extent to which the regulation has interfered with distinct investment-backed expectation; and the character of the governmental action. 438 U.S. at 124. This is the analysis which drives the following discussion.

DISCUSSION

WRRE first argues for inverse condemnation: a total or permanent tatting. Post-moratorium sales belie this claim. WRRE remains a very attractive and usable rural subdivision and lot sales are presently occurring.

WRRE next argues for a temporary taking and resulting compensation. This is a more complex issue. Setting aside the Penn-Central factors, and assuming arguendo that a temporary taking did occur during the 21-month period from August 1998 through May 2000, what about causation? What was it that slowed development along river lots in and near the City of Fargo? Was it the building moratorium? Or was it the indisputable fact of the 1997 flood itself? It is hard to separate the two, but in point of fact, anyone looking at Exhibit 165 (the aerial photograph of Wild Rice River Estates at the height of the 1997 flood) would hesitate to build a $250,000 to $350,000 house here. The subdivision is under water. Even the Ruttens made a 1997 flood claim on their home on Lot 16. Exhibits 132 through 152.

Even if we were to find causation, how would we assess damages? Pre-moratorium sales were at the rate of 1/2 lot per year (the average lot sales for 1994 until July 1998). If we round up 21 months to 24 months, the loss was one (1) lost/delayed lot sale. At trial, loss on one of the riverside lots would be approximately $30,000 according to the Wild Rice River Estates brokers. A mere delay equals the sum of delayed investment opportunity ("interest") would be more in the nature of $3,000, a far cry from the one million dollars plus claimed by WRRE. There is a huge disconnect between the fact of the history of WRRE development and its claim

for compensation.

Even after the moratorium was lifted, prospective buyers expressed concern about flooding, and references to water issues and dike issues, etc. Exhibits 17 (Steffens), 19 (Jellison), and 22 (Schultz). For example, Bonnie Rutten testified that local radio personality, Ed Schultz, changed his mind about purchasing his lot in WRRE because he was "afraid of water" and that Schultz had even done a radio program about the issue. In summary, then, many factors in addition to the short-lived moratorium, have affected WRRE's investment here over the years.

Turning then to the Penn Central facts, we must weigh "the character of the governmental action" against "the economic impact of the regulation on the claimant," and particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." 438 U.S. 104 at 127. The cases actually require some showing of diligence and good faith on behalf of the governmental entity so as to be able to argue that the character of the action is not a legal taking.

Here, Court finds on behalf of the City of Fargo. We may question the decision to move quickly with respect to moratorium without advance conversations with affected developers, the clarity of communications during the moratorium, etc. But the moratorium did not single out Plaintiffs property. Rather, it applied to other developments as well and the City has not paid compensation to other developers similarly affected. This was not an appropriation for public use, but rather a temporary moratorium until local, State and Federal officials could adequately review a flood plain management for the area so devastated by the 1997

flood. This is not a "taking" under Penn Central.

Finally, these is no evidence to support the malicious interference with third-party contract rights. Although Ms. Ruttm suspects that there was a "whisper campaign" which slowed down development during the moratorium, tbis was not proved by a preponderance of evidence at trial.

CONCLUSION

Accordingly, the Court determines that (1) No "taking" has occurred as alleged in the first cause of action; (2) No inverse condemnation has occurred as alleged in the second cause of action; and, (3) No malicious interference with third-party contract lights has occurred as alleged in the third cause of action.

Counsel for the City is directed to prepare Findings of Fact, Conclusions of Law and Order for Judgment consistent with this Memorandum Opinion.

Dated at Fargo, North Dakota, this 6th day of December, 2004.

BY THE COURT:

s/ Douglas R. Herman
Douglas R Herman
Judge of District Court
East Central Judicial District

IN DISTRICT COURT, COUNTY OF CASS,
STATE OF NORTH DAKOTA

Wild Rice River Estates, Inc.,

Plaintiff,

v.

City of Fargo, a municipal corporation,

Defendant.

Civil No. 09-02-C-703

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR JUDGMENT [Proposed]

The above-entitled matter came on for trial October 25 through October 29, 2004, the Honorable Douglas R. Herman, presiding. Plaintiff, Wild Rice River Estates, Inc., appeared through its attorney, Jonathan T. Garaas, of the Garaas Law Firm, of Fargo, North Dakota, and its designated representative, Bonnie Rutten. Defendant, the City of Fargo, appeared through its attorneys, Patricia A. Roscoe and Garylle B. Stewart of Solberg, Stewart, Miller & Tjon, Ltd., of Fargo, North Dakota. Six witnesses testified. One hundred seventy-two exhibits were received into evidence.

The Court, having heard the testimony and evidence concerning Plaintiff's allegations and considered the arguments of Counsel, and being fully advised in the premises, now makes the following Findings of Fact, Conclusions of Law and Order for Judgment.

FINDINGS OF FACT

1. The City of Fargo is a municipal corporation organized and existing under the laws of the State of North Dakota.

2. Plaintiff, Wild Rice River Estate, Inc. ("WRRE") is the owner/developer of a rural residential subdivision along the banks of the Wild Rice River 3.5 miles south of Fargo. The current subdivision was part of a 1947 rural land purchased by Anton Rutten, who maintained a farmstead nearby.

3. Thirty-eight lots, including 16 riverine lots, were platted in 1993. Lots 11-26 are on an oxbow of the Wild Rice River.

4. WRRE was incorporated in 1994 by Anton Rutten, to assist in development of WRRE. It was always the hope of Anton Rutten-a hope now shared by his daughter, Bonnie-to develop a high-end subdivision as the city of Fargo moved south and west. Anton Rutten passed away in 2002.

5. According to Cass County and Stanley Township regulations, WRRE was required to provide, at its expense, a connection to the public sanitary system, i.e., the Southeast Cass Water Resource Sewer District.

6. Southeast Cass Water Resource Sewer District remained the owner of the sewer system at all relevant times and is the current owner thereof.

7. Mr. Rutten protested having to connect to Southeast Cass Water Resource Sewer District, alleging that

the "economics of connecting to the system is too great."

8. The City of Fargo and WRRE entered into a 10-year Sewer Agreement whereby the City of Fargo would treat sewage collected by the Southeast Cass Water Resource District.

9. Sewer and water were installed by WRRE for Lots 13 through 26 of Block 1.

10. The City of Fargo continued to perform all of its obligations under the Sewer Agreement during the moratorium.

11. To the present date, the City of Fargo has fully complied with the terms of the Sewer Agreement.

12. As part of the development process, WRRE was required to submit a plat to Stanley Township. One of the questions on the Stanley Township Development Permit Application asks "[i]s the proposed development located in an area subject to flooding." Bonnie Rutten testified she answered "yes" to this question on the application.

13. At the time of platting, the required flood elevation for lots in WRRE was one foot above base floor elevation.

14. The elevation requirement for lots in WRRE before, during, and after the moratorium was one foot above the base flood elevation.

15. WRRE invested roughly $500,000 from 1993 to 1998 to develop and promote the subdivision.

16. The area of WRRE was eventually brought into the extraterritorial jurisdiction of the City of Fargo on August 1, 1997, pursuant to an Act of the North Dakota Legislature.

17. At one time a bridge and township road connected what is now 25th Street to the oxbow where Lots 26 through 15 are located. The bridge was removed in 1989 because of flood damage.

18. Bonnie Rutten, Plaintiff's President, Secretary, Treasurer, General Manager, and employee, has four years of real estate experience in Minneapolis, and has been involved in the development and marketing of the real property owned by Plaintiff.

19. WRRE sold the first lot in the development, Lot 18, to Kevin Rentz in 1994 for $24,000.

20. A highly successful realtor with experience in selling lots in other river developments including Highland Park and Oxbow, was only successful in selling the Rentz lot (Lot 18) in WRRE prior to the moratorium.

21. WRRE sold Lot 16 to Anton Rutten, its President and sole shareholder, in 1997.

22. The Red River Valley, including the Wild Rice River, has a long history of flooding. Recent flood years include 1969, 1978, 1979, 1984, 1985, 1989, 1997 and 2001. The 1997 flood followed a record-breaking snowfall winter and evolved into a 100-plus year event for communities from Wahpeton, North Dakota, to Selkirk, Manitoba. At Fargo, just down stream of where the Wild Rice joins the Red River

of the North, the water rose a vertical 22 feet above its banks.

23. At the height of the 1997 flood, all undeveloped lots within WRRE were under water. Only the fill under the three homes then existing at WRRE kept those homes out of the water-and then barely so.

24. Anyone looking at the aerial photograph of Wild Rice River Estate at the height of the 1997 flood would hesitate to build a $250,000 to $350,000 house there because the subdivision was under water.

25. City officials have measured the total flood-fighting costs for the 1997 flood at $3.3 million.

26. Bonnie Rutten and her father used a boat to inspect their home which was under construction on Lot 16 during the flood period.

27. Bonnie Rutten described the 1997 flood as "exciting."

28. The partially constructed Rutten home on Lot 16 was damaged by water and "muck" during the 1997 flood and the Ruttens made a claim to their insurance company for this damage.

29. Flood waters of the Wild Rice River have a history of causing damage to property.

30. A bridge that connected what is now 25th Street to the oxbow where Lots 26 through 15 are located was removed in 1989 because of flood damage.

31. The foundation of a silo, belonging to the Rutten family, was undercut by the current of the Wild Rice River during the 1997 flood and had to be taken down.

32. After the 1997 flood cleanup, the City of Fargo began working with the Federal Emergency Management Agency ("FEMA"), in part, to plan for future floods.

33. On June 15, 1998, FEMA (Federal Flood Emergency Management Agency) developed a preliminary flood insurance rate map FIRM). Prior to this time, the Wild Rice River did not have a mapped floodway.

34. As the City considered a new construction moratorium within its floodways (including floodways within its four-mile extraterritorial area) it included the Wild Rice River, anticipating that the FEMA designation for the Wild Rice River would be formalized within eighteen months, or so, according to agency practice.

35. In August of 1998, the City of Fargo was publishing the city commission agenda in the Fargo FORUM newspaper. Upon motion, the city commission at the August 10, 1998 city commission hearing, voted that a "moratorium" be placed on issuance of all building permits for new construction in the floodway within the City of Fargo and its four-mile extraterritorial zone effective August 10, 1998, for a period until the Fargo City Ordinances have been passed and FEMA has made a final determination on their flood plain map." The moratorium, which covered both the Wild Rice and Red Rivers, went into effect on August 11, 1998, following a Monday evening, August 10, 1998, City Commission meeting.

36. Bonnie Rutten, like all other property owners, was given notice of proposed action by city officials through publication of the City Commission's agenda concerning the August 10, 1998, city commission meeting.

37. WRRE presented no evidence showing that it, or any other party, was denied a building permit for any of the lots in WRRE because it could not satisfy elevation requirements.

38. WRRE had lots for sale that were completely unaffected by the moratorium. Portions of other lots in WRRE were located within the preliminary floodway designated by FEMA's June 15, 1998, FIRM panel as adopted by the Fargo City Commission.

39. WRRE had the same property (the same "parcel as a whole) before, during, and after the moratorium.

40. In May 1999, Bonnie Rutten applied for a building permit for Lot 21 in WRRE.

41. The City of Fargo does not utilize an application form for a building permit, per se. Instead, an applicant must submit plans sufficient for the inspections department to determine compliance with all applicable federal, state, and local requirements. These plans typically include a plot plan, floor plan, and building elevations. In the case of riverine Lots, information must be included on, and with, the plot plan which also indicates the location of flood plain of flood way on or adjacent to the property.

42. Bonnie Rutten was denied a building permit because Lot 21 was located within the preliminary designated

floodway, and thus, within the area covered by the moratorium.

43. During the moratorium, Marty and Brenda Steffens entered into a Lot Hold Agreement on November 17, 1999 for Lot 2 for $24,900. The Steffens canceled the agreement in November 2000, after the moratorium was lifted and at time when they could have obtained a building permit.

44. Neil and Linda Gaugler signed a purchase agreement on May 5, 1999, during the moratorium, for Lot 17 for $32,900.

45. Neil and Linda Gaugler eventually purchased Lot 17 in May 2000 for $32,900.

46. During the time the moratorium was in effect, Fargo city officials participated in many meetings with state, local, and federal officials concerning flood plan mitigation issues, specifically, issues regarding the moratorium.

47. Plaintiff's counsel attended a November 8, 1999, bus trip organized by city officials concerning the moratorium's purpose, impacts, and potential options in moving forward with the moratorium.

48. City Engineer, Mark Bittner, wrote to the Fargo City Commissioners on April 27, 2000, recommending, among other things, that the City terminate the building permit moratorium and adopt a preliminary flood insurance rate map (FIRM) panel dated June 15, 1998, as the governing panel for all flood-prone areas.

49. At the May 1, 2000, City Commission meeting, the Fargo City Commission held a public hearing on the moratorium and the proposed adoption of FEMA's June 15, 1998, FIRM panel. At the meeting, the City Commission voted to lift the moratorium.

50. WRRE advertised in its marketing materials that the City had lifted the moratorium and that homes in the development (there were only two there during the flood) were not affected by the 1997 flood.

51. WRRE has not had to discount lots at pre-moratorium prices in order to sell lots, but has in fact sold lots at higher prices since the moratorium was lifted. To the extent WRRE was economically viable before the moratorium, it remained so during the moratorium.

52. After the moratorium was lifted, Neil Gaugler built his home on that portion of Lot 17 that was unaffected by the moratorium.

53. After the moratorium was lifted, prospective buyers (Steffens-Lot 2, Block 1; Jellison-Lot 22; and Schultz-Lot 19) expressed concern about flooding, and references to water issues and dike issues, etc. According to Bonnie Rutten's testimony, local radio personality, Ed Schultz, changed his mind about purchasing his lot in WRRE because he was "afraid of water" and that Schultz had even done a radio program about the issue.

54. Many factors in addition to the short-lived moratorium, have affected WRRE's investment over the years.

55. In April, 2001, flood waters from the Wild Rice River covered many of the unsold lots in WRRE, including Lots 19, 21 and 22 which are now occupied by homes.

56. In June, 2004, waters of the Wild Rice River rose out of its banks as the result of heavy rain.

57. WRRE remains a very attractive and usable rural subdivision and lot sales are presently occurring.

58. WRRE has sold five lots since the moratorium was lifted, four more than it sold during the 4-year period before the moratorium.

59. Christopher Johnson purchased Lot 19 in March, 2002, for $39,000.

60. Marilyn Wold purchased Lot 21 in November, 2002, for $39,000.

61. John and Paula Grettum purchased Lot 22 in July of 2003, for $55,900.

62. Dean and JoAnn Hornbacher purchased Lot 20 in April, 2004, for $59,900.

63. As a result of these sales, Plaintiff no longer makes a claim against Defendant as to the lots sold after the moratorium.

64. Bonnie Rutten says that she enjoys living by the Wild Rice River because "it's alive," and she encourages people who buy lots in WRRE to build two-story homes so

they can "go upstairs" when there is a flood.

65. Plaintiff's attorney filed and served this lawsuit in March 2000, alleging that property located within WRRE "has been taken and damaged without just compensation having been made or paid, all in violation of the Fifth/Fourteenth Amendments of the United States Constitution, Article I, § 16, of the Constitution of North Dakota, and Chapter 32-15 of the North Dakota Century Code, among other statutes and rules of law."

66. For its second cause of action Plaintiff alleges that the City's moratorium constitutes inverse condemnation.

67. For its third cause of action Plaintiff alleges that the "City interfered with Plaintiff's contractual relationships which also constitutes a wrongful taking or a wrongful tort" and that the City, "acting through its agents or employees, have maliciously interfered with Plaintiff's contractual rights and/or interfered with Plaintiff's business relationships and prospective economic advantages."

68. Plaintiff alleges damages in the amount of $1,195,000.00,- plus interest, for each cause of action.

69. Following completion of trial and the filing by parties of post-trial papers, the Court issued a Memorandum Opinion concluding the following:

> 1. No "taking" has occurred as alleged in the first cause of action.
>
> 2. No inverse condemnation has occurred as alleged in the second cause of

action

3. No malicious interference with third-party contract rights as occurred as alleged in the third cause of action.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the subject matter and of the parties in this action.

2. The City of Fargo, acting through its board of city commissioners, has authority to adopt ordinances, resolutions, and regulations as may be proper and necessary to carry into effect the powers granted to the city or as the general welfare of the city may require. See N.D.C.C. § 40-0501, Fargo Municipal Code, Art.3.

3. The Fargo City Commission also has authority to adopt by ordinance the conditions, provisions and terms of various codes, and any such code incm;)orated by reference shall have the same force and effect as though they are specifically referenced in the ordinance. See N.D.C.C. § 40-05-01(1).

4. The City of Fargo issued the moratorium, after the 1997 devastating flood, as a valid exercise of its police power and as part of an effort to preserve the status quo concerning development in flood-prone areas while city officials worked with other local, state and federal officials to formulate a more detailed flood management plan and associated development strategy for flood-prone areas within the City of Fargo's jurisdiction.

5. The Fifth Amendment to the United States Constitution, made applicable to the states through the Due Process Clause of the Fourteenth Amendment, see Rippley v. City of Lincoln, 330 N.W.2d 505, 507, n. 1 (N.D. 1983) (citing Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980)), prohibits the taking of private property by the government unless just compensation is paid.

6. Article I, Section 16 of the North Dakota Constitution states that "private property shall not be taken or damaged for public use without just compensation."

7. To the extent that there is any conflict between the Federal cases and the State cases, the Court would follow the North Dakota State cases where broader property rights appear to be protected under State law. Braunagel v. City of Devils Lake, 2001 ND 118, § 16. Grand Forks-Traill Water Users, Inc. v. Hjelle, 413 N.W.2d 344, 346 (N.D. 1987).

8. The North Dakota Supreme Court has summarized taking analysis as follows:

> Under this provision, [Under Article I, section 16, N.D. Const., [the City, acting through its police powers, has broad authority to enact land-use regulations without compensating the landowner for the restrictions placed; upon use of the property. Grand Forks-Traill Water Users Inc. v. Hjelle, 413 N.W.2d 344, 346 (N.D. 1987); Rippley v. City of Lincoln, 330 N.W.2d 505, 507 (N.D. 1983); Kraft v. Malone, 313 N.W.2d 758, 761 (N.D. 1981), overruled on other grounds by Shark v.

> Thompson, 373 N.W.2d 859 (N.D. 1985); Eck v. City of Bismarck, 283 N.W.2d 193, 197 (N.D. 1979). A zoning ordinance does not constitute a taking of property for public use merely because it diminishes the value of the regulated property or disallows the best and highest use of the property. Grand Forks-Traill, at 346; Rippley, at 507; Eck, at 197. Governmental regulation constitutes a taking for public use only when it deprives the owner of all or substantially all reasonable uses of the property. Grand Forks-Traill, at 346; Rippley, at 507; Kraft, at 761. The determination whether there has been a taking of private property for public use is a question of law which is fully reviewable by this Court on appeal. Minch v. City of Fargo, 332 N.W.2d 71, 73 (N.D. 1983); Rippley, at 507; Kraft, at 761.

Braunagel v. City of Devils Lake, 2001 ND 118, § 16.[1]

9. "[I]n determining whether a restriction constitutes a taking, courts look to the effect of the restriction on the parcel of land as a whole, rather than to the effect on individual interests in the land." Grand Forks-Traill Water Users v. Hjelle, 413 N.W.2d 3-14, 346-47 (N.D. 1987)

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[1] See also Eck v. City of Bismarck, 302 N.W.2d 739, 741 (N.D. 1981) (Eck II) (Thus, to withstand an attack on its validity, the zoning ordinance must bear a reasonable relationship to a legitimate governmental purpose and must not be arbitrary or capricious nor deprive a property owner of all or substantially all reasonable uses of the zoned land.").

(citing Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) (quoting Penn Central Transp. Co. v. City of New York, 438 U.S. 104, 130-131, (1978)). See also Rippley, 330 N.W2d 505 (N.D. 1983) (citing Justice Brennan's dissenting opinion in San Diego Gas and Electric Company v. City of San Diego, 450 U.S. 621 (1981) (Brennan, J. dissenting)).

10. North Dakota Constitutional protections are consistent with the United State's recent decision in Tahoe-Sierra, which held that a temporary development moratorium does not constitute a per se taking of property or a taking under the balancing test established in Penn Central Transp. Co. v. New York City, 438 U.S. 104,124 (1978). See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 336 (2002).

11. Under the protections guaranteed by either the North Dakota of Federal Constitution, the City of Fargo's temporary moratorium did not permanently deprive Plaintiff of all, or substantially all, economically viable use of its property and the moratorium did not amount to a total taking of Plaintiff's property.

12. WRRE retained economically viable use of its property during the moratorium. Cf. Palazzolo v. Rhode Island, 533 U.S. 606, 632 (2001) (holding that reduction in developer's property from $3,150,000 to $200,000, due to a state coastal committee's refusal to allow development in costal area, did not amount to a deprivation of all economic value and therefore did not amount to a total takings claim).

13. There is a huge disconnect between the fact of the history of WRRE development and its claim for

compensation. Pre-moratorium sales were at the rate of ½ lot per year (the average lots sales for 1994 until July 1998). Rounding up 21 to 24 months, the loss was one (1) lost/delayed lot sale. At trial, loss on one of the riverside lots would be approximately $30,000 according to the Wild Rice River Estates brokers. A mere delay equals the sum of delayed investment opportunity ("interest") would be more in the nature of $3,000, a far cry from the one million dollars plus claimed by WRRE. Furthermore, "[m]ere fluctuations in value during the process of governmental decision-making, absent extraordinary delay, are incidents of ownership. They cannot be considered a taking in the constitutional sense." Tahoe-Sierra, 535 U.S. at 332. This is because, "[l]ogically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover values as soon as the prohibition is lifted." Tahoe-Sierra, 535 U.S. at 332, 337-38 (noting that moratoria "are used widely among land-use planners to preserve the status quo while formulating a more permanent development strategy" and community planners refer to moratoria as 'interim development controls' which are an essential tool to successful development).

14. Applying Penn Central's balancing test, the Court finds on behalf of the City of Fargo.

15. The moratorium did not single out Plaintiff's property. Rather, it applied to other developments as well and the City has not paid compensation to other developers similarly affected. Cf. Tahoe-Sierra, 535 U.S. at 340 (stating that the need to protect planners' decisional process is stronger when developing a regional plan as opposed to considering a permit for a single parcel).

16. The moratorium was not an appropriation of WRRE's property for public use, but rather a temporary moratorium until local, State and Federal officials could adequately review a flood plain management for the area so devastated by the 1997 flood.

17. The moratorium was not a "taking" under Penn Central.

18. Fargo city officials acted in good faith and with proper diligence concerning the moratorium as part of an overall effort to maintain the status quo until flood planning efforts and development could be re-evaluated after the devastating 1997 flood.

19. Fargo city officials were justified in waiting for FEMA's final adoption of a floodway for the Wild Rice River and other rivers in the Red River Valley.

20. The moratorium protected prospective buyers who might build on a river lot, not knowing, for example, that a home previously located on or next to the lot was damaged or destroyed by the 1997 flood.

21. Given the devastation and cost in damages caused by the flood, the City's moratorium was a reasonable, appropriate land-use regulation, issued in an effort to maintain the status quo of development in flood-prone areas until Fargo city officials and local, state and federal agencies had an opportunity to properly review and prepare an appropriate flood management plan for flood-prone areas within the City of Fargo's extraterritorial jurisdiction.

22. The City's moratorium bears a reasonable

relationship to a legitimate governmental purpose; it is not arbitrary or capricious and does not amount to an unconstitutional taking of property requiring payment of just compensation.

23. There is no evidence to support Plaintiff's claim for malicious interference with third-party rights. Although Ms. Rutten suspects that there was a "whisper campaign" which slowed down development during the moratorium, this was not proved by a preponderance of evidence at trial. See Bismarck Realty Co. v. Folden, 354 N.W.2d 636, 642 (N.D.1984) (to succeed on a claim of tortious interference with contractual relations, the plaintiff must show "(1) a contract existed; (2) the contract was breached; (3) the defendant instigated the breach; and (4) the defendant did so without justification").

24. WRRE introduced no evidence as to actual damages because a business relationship or expectancy was supposedly disrupted. See Trade 'N Post, L.L.C. v. World Duty Free Americas, Inc., 2001 ND 116, ¶ 36, 628 N.W.2d 707 (listing elements of claim for tortious interference with business); Smith Enterprises v. In-Touch Phone Cards, 2004 ND 169, 20 (to satisfy damages element there must be proof that the interference caused the harm sustained).

25. WRRE introduced no evidence showing that the City of Fargo has breached its sewer agreement with WRRE in any way.

26. No "taking" has occurred as alleged in the first cause of action.

27. No inverse condemnation has occurred as

alleged in the second cause of action; and

28. No malicious interference with third-party contract rights as occurred as alleged in the third cause of action.

ORDER FOR JUDGMENT

WHEREFORE, IT IS HEREBY ORDERED THAT Plaintiff's case be dismissed with prejudice, and in its entirety, as against Defendant, the City of Fargo.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated at Fargo, North Dakota, this 23rd day of December, 2004.

BY THE COURT

s/ Douglas R. Herman
Douglas R. Herman
Judge of District Court
East Central Judicial District

IN THE DISTRICT COURT, COUNTY OF CASS,
STATE OF NORTH DAKOTA

Wild Rice River Estates, Inc.,

Civil No.09-02-C-703

Plaintiff,

v.

JUDGMENT OF DISMISSAL

City of Fargo, a
municipal corporation,

Defendant.

The above-entitled matter came on for trial October 25 through October 29, 2004, the Honorable Douglas R. Herman, presiding. Plaintiff, Wild Rice River Estates, Inc., appeared through its attorney, Jonathan T. Garaas, of the Garaas Law Firm, of Fargo, North Dakota, and its designated representative, Bonnie Rutten. Defendant, the City of Fargo, appeared through its attorneys, Patricia A. Roscoe and Garylle B. Stewart of Solberg, Stewart, Miller & Tjon, Ltd., of Fargo, North Dakota.

The Court, having made its Findings of Fact, Conclusions of Law and Order for Judgment, having heard the testimony and evidence concerning Plaintiff's allegations and considered the arguments of Counsel, and being fully advised in the premises, now makes the following Findings of Fact, Conclusions of Law and Order for Judgment.

NOW, THEREFORE, IT IS HEREBY ORDERED;

1. That Plaintiff's case be dismissed with

prejudice, and in its entirety, as against Defendant, the City of Fargo.

Witness, the Honorable Douglas R. Herman and my hand and seal affixed this 27th day of December, 2004.

Dorothy Howard
Clerk of District Court

By s/ Linda Brooks, Deputy
Deputy Clerk

IN THE DISTRICT COURT, COUNTY OF CASS,
STATE OF NORTH DAKOTA

Wild Rice River Estates, Inc.,

Plaintiff,

vs.

City of Fargo, a
municipal corporation,

Defendant.

ORDER DENYING
PLAINTIFF'S
POST TRIAL
MOTIONS

File No.09-02-C-00703

After service of the Court's Memorandum Opinion and contemporary with the Court's execution of the Findings of Fact, Conclusions of Law, and Order for Judgment prepared by the Defendant City of Fargo, Plaintiff filed post-trial motions entitled "Response to Documents Prepared by City of Fargo Purporting to be Submitted Pursuant to N.D.R.CT. 7.1; Motion for Amendment Pursuant to N.D.R.Civ.P. 52(b); and Motion to Alter or Amend a Judgment Pursuant to N.D.R.Civ.P. 59(j)." For the reasons set forth below all post-trial motions are DENIED.

Essentially, Plaintiffs motions focus on three arguments. The first argument is based upon a reading of Rippley v. City of Lincoln, 330 N.W.2d 505 (N.D. 1983). Plaintiff reargues a taking and that the City had an affirmative duty to give formal notice of abandonment of the taking (the moratorium) in order to avoid payment for compensation for the 20 months and 20 days of the moratorium. The Court disagrees with this reading of Rippley

because Rippley first found that a "taking" had occurred. Here, the Court found no temporary taking, much less a permanent taking and believes that Rippley is therefore inapposit to these proceedings. The City was not required to plead abandonment of the moratorium because the moratorium was not a taking in the first instance.

The second essential argument within the Plaintiff's post-trial motions is directed to details of the draft findings prepared by the City, e.g. that the delegation by the Court of preparation of findings of fact is inappropriate; that the language of the proposed findings are not completely consistent with oral argument after testimony; that the Defendant City included new case law. All these arguments are rejected. The findings are appropriately tailored to meet the pleadings in the case, the proof at trial, the post-trial arguments and most importantly the gist of the Court's Memorandum Opinion.

Finally, Plaintiff urges the Court to make additional findings of fact which would cause the Court to determine that a constitution taking, in fact, occurred. The Court declines and continues to believe that no taking occurred here based on the proof at trial and the applicable legal authority.

Dated this 18th day of January, 2005.

BY THE COURT:

s/ Douglas R. Herman
Douglas R. Herman
District Court Judge
East Central Judicial District

SUPREME COURT OF NORTH DAKOTA
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CLERK OF THE SUPREME COURT
PENNY MILLER CHIEF DEPUTY CLERK
COLETTE M. BRUGGMAN

December 23, 2005

Mr. Jonathan T. Garaas
Attorney at Law
Garaas Law Firm
DeMores Office Park
1314 23rd Street South
Fargo, ND 58103-3796

RE: Wild Rice River Estates v. City of Fargo
Supreme Court No. 20050074
Cass Co. No. 02-C-00703

The Supreme Court entered an order today denying the petition for rehearing in this matter.

Pursuant to Rule 41(a), N.D.R.App.P., the mandate of the Supreme Court will be forwarded to the clerk of the trial court after the expiration of seven days.

Sincerely yours,

s/ Penny Miller
Penny Miller
Clerk
North Dakota Supreme Court

PM:ml
pc: Mr. Garylle B. Stewart & Ms. Patricia A. Roscoe
The Honorable Douglas R. Herman

IN THE DISTRICT COURT OF
CASS COUNTY, NORTH DAKOTA

Wild Rice River Estates, Inc.,

Plaintiff, Civil No. _____

vs. COMPLAINT

City of Fargo, a municipal corporation,

Defendant.

Plaintiff for a cause of action against Defendant, complains and alleges as follows:

BACKGROUND

I.

Plaintiff is the owner of certain real property located in the County of Cass, State of North Dakota, described as follows:

SCHEDULE A REAL PROPERTY OWNED BY PLAINTIFF		
LEGAL DESCRIPTION Wild Rice River Estates Subdivision	ORIGINAL VALUE OF PROPERTY	VALUE OF SPECIAL IMPROVE-MENTS & SPECIAL EXPENSES ATTRIBUTED TO SPECIFIC LOT
Lot 1A of Block 1	DEDICATED FOR PARK	DEDICATED FOR PARK
Lot 1B of Block 1	DEDICATED FOR PARK	DEDICATED FOR PARK
Lot 1C of Block 1	DEDICATED FOR PARK	DEDICATED FOR PARK
Lot 2 of Block 1	$ 24,900.00	$ 10,000.00
Lot 3 of Block 1	$ 24,900.00	$ 10,000.00
Lot 4 of Block 1	$ 24,900.00	$ 10,000.00
Lot 5 of Block 1	$ 24,900.00	$ 10,000.00
Lot 6 of Block 1	$ 24,900.00	$ 10,000.00
Lot 7 of Block 1	$ 24,900.00	$ 10,000.00
Lot 8 of Block 1	$ 24,900.00	$ 10,000.00

SCHEDULE A REAL PROPERTY OWNED BY PLAINTIFF		
Lot 9 of Block 1	$ 24,900.00	$ 10,000.00
Lot 10 of Block 1	$ 24,900.00	$ 10,000.00
Lot 11 of Block 1	$ 24,900.00	$ 10,000.00
Lot 12 of Block 1	$ 24,900.00	$ 10,000.00
Lot 13 of Block 1	$ 24,900.00	$ 10,000.00
Lot 14 of Block 1	$ 24,900.00	$ 10,000.00
Lot 15 of Block 1	$ 26,900.00	$ 10,000.00
Lot 17 of Block 1	$ 26,900.00	$ 10,000.00
Lot 19 of Block 1	$ 29,900.00	$ 10,000.00
Lot 20 of Block 1	$ 29,900.00	$ 10,000.00
Lot 21 of Block 1	$ 29,900.00	$ 10,000.00
Lot 22 of Block 1	$ 29,900.00	$ 10,000.00
Lot 23 of Block 1	$ 29,900.00	$ 10,000.00
Lot 24 of Block 1	$ 44,900.00	$ 10,000.00
Lot 25 of Block 1	$ 44,900.00	$ 10,000.00
Lot 26 of Block 1 [included in Lot 24 & 25]	$ 0.00	$ 0.00

SCHEDULE A REAL PROPERTY OWNED BY PLAINTIFF		
Lot 1 of Block 2	$ 24,900.00	$ 10,000.00
Lot 1 of Block 3	$ 24,900.00	$ 10,000.00
Lot 2 of Block 3	$ 24,900.00	$ 10,000.00
Lot 3 of Block 3	$ 24,900.00	$ 10,000.00
Lot 4 of Block 3	$ 24,900.00	$ 10,000.00
Lot 5 of Block 3	$ 24,900.00	$ 10,000.00
Lot 6 of Block 3	$ 24,900.00	$ 10,000.00
Lot 7 of Block 3	$ 24,900.00	$ 10,000.00
Lot 8 of Block 3	$ 24,900.00	$ 10,000.00
Lot 9 of Block 3	$ 34,900.00	$ 10,000.00
Subtotals	$ 875,800.00	$ 320,000.00

II.

The City of Fargo is a municipal corporation

The actual expenses associated with the special improvements are higher than that number attributed for each lot. At the time of the taking on August 10, 1998, Plaintiff had identified $10,000 per lot as the appropriate amount allotted for each lot and Plaintiff has continued with said amount so as to be consistent with the value affixed by actual sales prices.

organized and existing under the laws of the State of North Dakota.

III.

Defendant has and is authorized to exercise the right of eminent domain, and to condemn all real estate, rights and interests therein deemed necessary by it for carrying out its governmental purposes. It also exercises extra-territorial zoning authority up to four (4) miles outside of the City of Fargo's boundaries pursuant to § 40-47-01.1 of the North Dakota Century Code, and pursuant to the authority of the North Dakota Supreme Court's opinions, the control of building permits within said geographical area.

IV.

On August 10, 1998, the City of Fargo, acting through its commissioners, passed a moratorium "on the issuance of all building permits for new construction in the floodway within the City of Fargo and its four-mile extraterritorial zone effective August 10, 1998, for a period until the Fargo City Ordinances have been passed and FEMA has made a final determination on their flood plain map.

V.

In the spring of 1999, Plaintiff initiated a process by which an application for a building permit for a house to be constructed on Lot 21 in Block 1 of Wild Rice River Estates was sought from Defendant.

VI.

On June 2, 1999, after submission of all underlying documentation to the Building Inspector for the Inspections Department of the City of Fargo, Plaintiff's agent was informed that "there is currently a moratorium on building permits for properties located within the preliminary flood way designated by FEMA. In response to that designation, the Fargo City Commission placed the moratorium on all building permits within the moratorium area."

A copy of the letter dated June 2, 1999, from Building Inspector Steve Durensky is attached hereto, marked Exhibit 1, and incorporated by reference.

VII.

Plaintiff has performed all actions necessary to fulfill all legal requirements for the issuance of a building permit except for the payment of the necessary building permit fee also authorized by law.

Plaintiff has been willing to make such payment but the Defendant will not accept such payment.

VIII.

On August 25, 1999, Plaintiff caused a letter to be written to the Defendant's legal counsel outlining the circumstances referenced above.

A copy of said letter is attached hereto, marked

Exhibit 2, and incorporated by reference. Defendant, acting through its agents, sought time within which to explore possible acquisition of the real property owned by Plaintiff described above utilizing funds in excess of $1,000,000 available to Defendant and/or other political subdivisions of the State of North Dakota, which request for delay was accommodated by Plaintiff.

IX.

Early in 2000, upon learning that such funding was not likely utilizing any of the Federal funds available to the Defendant and/or other political subdivisions of the State of North Dakota, Plaintiff caused a second letter to be written to the Defendant's legal counsel again outlining the circumstances referenced above.

A copy of said letter is attached hereto, marked Exhibit 3, and incorporated by reference.

Defendant has never responded directly to Exhibit 3, nor has Defendant taken any steps to eliminate the building permit moratorium.

However, on March 14, 2000, the City Engineer for Defendant, wrote the Board of City Commissioners acknowledging, among other things:

> "On August 10, 1998, the City commission placed a moratorium on issuance of building permits in flood prone areas. The moratorium was placed on property that was being

> mapped into the floodway by an updated FEMA Flood Insurance Rate Map (FIRM) dated June 15, 1998. The areas affected generally included property along the Wild Rice River which previously did not have a mapped floodway and areas along the Red River near the confluence with the Wild Rice River. **The moratorium was intended to prohibit construction in these areas until the revised FIRM panel could be formally adopted by FEMA.**
>
> ...
>
> Due to the delay in the formal adoption of a revised FIRM panel in this area, **City and County staff have been evaluating the need to modify the building permit moratorium while maintaining a desire to restrict construction in flood prone areas.**" [**emphasis** added]

A copy of the letter dated March 14, 2000, [not including the meeting summary for the November 8, 1999, informational meeting and bus tour] is attached hereto, marked Exhibit 4, and incorporated by reference.

Rather than lift the moratorium, the Board of City Commissioners for Defendant has initiated a process by which they seek to hereafter adopt the June 15, 1998, FIRM panel as the governing map for the extraterritorial area

purportedly under its jurisdiction.

FIRST CAUSE OF ACTION
[INCORPORATING PRIOR ALLEGATIONS I-X]

XI.

The acts of Defendant in placing a moratorium upon such building permits were done wrongfully, unlawfully, and without prior condemnation.

The acts of Defendant in refusing to issue a building permit were done wrongfully, unlawfully, and without prior condemnation.

XII.

Since the moratorium, the value of Plaintiff's property described above has been substantially reduced and may have no value whatsoever for the contemplated purposes -- sale of residential lots or building of new housing for subsequent sale.

XIII.

The described property of plaintiff has been taken and damaged without just compensation having been made or paid, all in violation of the Fifth/Fourteenth Amendments of the United States Constitution, Article I, § 16, of the Constitution of North Dakota, and Chapter 32-15 of the North Dakota Century Code, among other statutes and rules of law. Plaintiff is entitled to be compensated in a sum of not

less than the reasonable value thereof. Not intending to identify all legal directives, Plaintiff points out the decisions of City of Fargo, Cass County v. Harwood Township, 256 N.W.2d 694 (N.D. 1977); Lucas V. South Carolina Coastal Council, 505 U.S. 1003 (1992); and First Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987) as being particularly significant.

As a result of the Defendant's unauthorized taking of an interest in Plaintiff's property, a right has accrued to Plaintiff for the recovery from Defendant of just compensation for the interest taken from the date that the taking was effected, August 10, 1998, plus interest at the maximum legal rate allowed by law. The amount of Plaintiff's claim for the taking is One Million One Hundred Ninety-five Thousand and no/100 ($1,195,000.00) Dollars, plus interest.

SECOND CAUSE OF ACTION
[INCORPORATING ALL PRIOR ALLEGATIONS]

XIV.

In furtherance of said concepts, Plaintiff also asserts this is an inverse condemnation action arising out of an unconstitutional taking by the Defendant without formal condemnation or payment of compensation of an interest in Plaintiff's property. The amount of Plaintiff's claim for the taking is One Million One Hundred Ninety-five Thousand and no/100 ($1,195,000.00) Dollars, plus interest.

Plaintiff's claim is based on the prohibitions of the

Fifth/Fourteenth Amendments of the United States Constitution, Article I, § 16, of the Constitution of North Dakota, and Chapter 32-14 of the North Dakota Century Code, among other statutes and rules of law, all of which are against the taking of private property without just compensation. Not intending to identify all legal directives, Plaintiff points out the decisions of City of Fargo, Cass County v. Harwood Township, 256 N.W.2d 694 (N.D. 1977); Lucas V. South Carolina Coastal Council, 505 U.S. 1003 (1992); and First Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987) as being particularly significant.

XV.

As a result of the Defendant's unauthorized taking of an interest in Plaintiff's property, a right has accrued to Plaintiff for the recovery from Defendant of just compensation for the interest taken from the date that the taking was effected, August 10, 1998, plus interest at the maximum legal rate allowed by law. The sum claimed by Plaintiff as a just compensation for the taking of the interest in its land is that sum being the difference between the fair market value of Plaintiff's land immediately before and immediately after Defendant's taking of the interest as aforesaid. The amount of Plaintiff's claim for the taking is One Million One Hundred Ninety-five Thousand and no/100 ($1,195,000.00) Dollars, plus interest, less its value as farmland after the taking, with interest on the difference.

THIRD CAUSE OF ACTION
[INCORPORATING ALL PRIOR ALLEGATIONS]

XVI.

In furtherance of said concepts, Plaintiff also asserts that Defendant has interfered with Plaintiff's contractual relationships which also constitutes a wrongful taking or a wrongful tort. Plaintiff has entered into various contractual relationships with diverse individuals for the sale of a lot under sales agreements or "hold agreements" only to learn that the Defendant refused to permit prospective purchasers to obtain building permits thereby precluding sale.

Defendant, acting through its agents or employees, have maliciously interfered with Plaintiff's contractual rights and/or interfered with Plaintiff's business relationships and prospective economic advantages.

Upon information and belief, Plaintiff asserts that Defendant and its agents or employees have engaged in a deliberate campaign to discourage acquisition or purchase of Plaintiff's property by individuals that actually entered into contractual arrangements with Plaintiff, or were contemplating such contractual arrangements.

That Defendant and its agents or employees were aware of such relationships or expectancies and intentionally and unjustifiably interfered by referencing the Defendant's moratorium which precluded any development of the real property owned by Plaintiff and proposed to be sold to said purchasers for construction of their personal residences.

All of such actions give rise to Plaintiff's action based upon either tortious interference with contract or tortious interference with business relationships and/or prospective economic advantages. The amount of Plaintiff's claim for such tortious behavior is One Million One Hundred Ninety-five Thousand and no/100 ($1,195,000.00) Dollars, plus interest.

Plaintiff's claim is based on the prohibition of the Fifth/Fourteenth Amendments of the United States Constitution, Article I, § 16, of the Constitution of North Dakota, and Chapter 32-14 of the North Dakota Century Code, among other statutes and rules of law, all of which are against the taking of private property without just compensation. Plaintiff also relies upon the principles set forth in Messiha v. State of North Dakota, 1998 ND 149, and Hennum v. City of Medina, 402 N.W.2d 327 (N.D. 1987), among others.

Wherefore, the Plaintiff prays:

1. For judgment for plaintiff against the City of Fargo in the sum of One Million One Hundred Ninety-five Thousand and no/100 ($1,195,000.00) Dollars;

2. For interest at the lawful rate from the date of the taking of an interest in Plaintiff's property, August 10, 1998, until the judgment is paid;

3. Full recovery herein of Plaintiff's costs and attorney fees recoverable under provisions of the Constitution of the United States, the Constitution of North Dakota, and

Chapter 32-15 of the North Dakota Century Code, among any other statutes or rules of law affecting such an award [with particular reference drawn to N.D.C.C.§ 32-15-32 authorizing reasonable attorney's fees for all judicial proceedings]; and

4. For such other and further relief as the court deems proper.

Dated this 29th day of March, 2000.

GARAAS LAW FIRM

s/ Jonathan T. Garaas
Jonathan T. Garaas
Attorneys for Plaintiff
Office and Post Office Address:
DeMores Office Park
1314 23rd Street South
Fargo, North Dakota 58103-3796
Telephone: (701) 293-7211
North Dakota Bar ID #03080

IN THE DISTRICT COURT OF CASS COUNTY,
NORTH DAKOTA

Wild Rice River Estates, Inc.,

Plaintiff, Civil No. 09-02-C-0703

vs.

City of Fargo,
a municipal corporation,

Defendant

RESPONSE TO DOCUMENTS PREPARED BY CITY OF FARGO PURPORTING TO BE SUBMITTED PURSUANT TO N.D.R.CT. 7.1
&
MOTION FOR AMENDMENT PURSUANT TO N.D.R.Civ.P. 52(b)
&
MOTION TO ALTER OR AMEND A JUDGMENT PURSUANT TO N.D.R.Civ.P. 59(j)

* * *

3. **Even if North Dakota had not already adopted a requirement for just compensation when moratoriums are abandoned, so that the issue was presented for the**

first time, Tahoe-Sierra and Penn Central would dictate the same result.

The City of Fargo, and the Court's Memorandum Opinion, seeks *unavailable legal solace* in Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002) which posed the singular question at the onset of the opinion:

> The question presented is whether a moratorium on development imposed during the process of devising a comprehensive land-use plan constitutes a *per se* taking of property requiring compensation under the Takings Clause of the United States Constitution.

Ultimately the United States Supreme Court determined no such *per se* rule existed, but in the process, the Supreme Court also outlined the procedure by which just compensation is determined in regulatory takings when application of only the Constitution of the United States is appropriate [as compared to our broader property rights in North Dakota].

First, Tahoe-Sierra reaffirmed the "categorical rule that (the United States Supreme Court) applied in *Lucas* (which) states that compensation is required when a regulation deprives an owner of '*all* economically beneficial uses' of his land." Tahoe-Sierra Preservation Council, Inc.

v. Tahoe Regional Planning Agency, 535 U.S. 302, 330 (2002) [and later on the same page, "the permanent 'obliteration of the value' of a fee simple estate constitutes a categorical taking .."][3] This is the first reason that Tahoe-

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[3] Special Note: Buegel v. City of Grand Forks, 475 N.W.2d 133, 135 (N.D. 1991) provides:

> "If, however, the regulation forbids all reasonable use of the regulated property the property owner may be compensated through an inverse condemnation action. *E.g., Rippley v. City of Lincoln*, 330 N.W.2d 505 (N.D.1983). As a further exception to the rule of no compensation, this court has recognized that 'a landowner who has made substantial expenditures in reliance upon existing zoning or otherwise committed himself to his substantial disadvantage before the zoning change may be protected.' *City of Fargo v. Harwood Twp.*, 256 N.W.2d 694, 700 (N.D.1977). It is this latter exception that the trial court used to impose liability upon the City by applying a species of estoppel. We agree that the 'substantial reliance' exception is essentially an exception grounded on the doctrine of estoppel."

North Dakota does not require a standard based upon loss of "all use" of the property, and no challenge was ever made to the evidence of substantial expenditure by Plaintiff for subsequent sale of the Plaintiff's lots. Plaintiff asserts the City of Fargo's own pleadings in the instant case establish the application of a permanent taking concept due to North Dakota's requirement that the City of Fargo adhere to the notice requirements imposed upon governments in Rippley. North Dakota's case law would be consistent with this legal standard imposed by the Constitution of the United States. In 614 Co. v. Minneapolis Community Development, 547 N.W.2d 400, 407 (Minn.App.1996) approved a cause of action when the government's action "left appellant without economically viable rental and development uses." Not even the City of Fargo has argued, or presented evidence of, any viable rental or

Sierra provides no legal solace for the City of Fargo – the moratorium categorically deprived the owner of the property from "all economically beneficial uses of his land" for almost twenty-one months during the moratorium.

Next, Tahoe-Sierra identified seven (7) possible moratoria theories of takings, but addressed only the three (3) theories actually presented in the petition for certiorari which led to the Tahoe-Sierra decision [the other four theories being still undecided by the United States Supreme Court].[4]

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development uses available to Plaintiff during the moratorium, in the process impliedly recognizing the real property value as platted land to be sold for construction of new homes – nothing else. It is this use of the property that was stopped for almost 21 months – for no substantial reason because the new ordinances did not apply [ever] and it would be an abuse of regulatory authority to attempt to freeze the price of Plaintiff's property without proper exercise of eminent domain proceedings.

[4] Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 333 (2002) identifies the seven theories for just compensation for moratoria, which the undersigned paraphrases as follows: (1) categorical rule that "compensation is required whenever government temporarily deprives an owner of all economically viable use of her property;" (2) narrower rule that covers "all temporary land-use restrictions except those 'normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like;" (3) rule allowing for "short fixed period for deliberation ... without compensation say maximum one year after which the just compensation requirements would 'kick in;" (4) successive actions are "'series of rolling moratoria' that were the functional equivalent of a permanent taking;" (5) agency stall to avoid other actions; (6) moratoria does not "substantially advance a legitimate state interest;" and (7) necessity to challenge the application of the moratoria to their individual

Finally, Tahoe-Sierra, at page 342, determines, "'fairness and justice' will be best served by relying on the familiar *Penn Central* approach when deciding (moratoria) cases like this, rather than by attempting to craft a new categorical rule." Applying the *Penn Central* approach dictates the following criteria, as succinctly stated in Berst v. Snohomish County, 57 P.3d 273, 279 (Wash. 2001):

> In *Penn Central,* the Supreme Court characterized previous takings analyses as "these essentially ad hoc, factual inquiries" in which the court considered several factors: the economic impact of the regulation on the claimant; the extent to which the regulation has interfered with distinct investment-backed expectations; and the character of the governmental action. [citing *Penn Central,* 438 U.S. at 124, 98 S.Ct. 2646.]

Plaintiff also asserts a taking for which just compensation is required under the Penn Central standards. Plaintiff's discussion set forth in its Findings of Fact, Conclusions of Law, and Order for Judgment [Plaintiff's Proposed], a copy of which is attached, is hereby incorporated by reference. Plaintiff asserts particular attention should be paid to pages 37 to 51 [with pertinent facts on earlier pages].

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parcels so as to allow a *Penn Central* analysis. Tahoe-Sierra did not address theories (4), (5), (6), or (7), but all seven theories are being presented in the instant case by pleadings and or facts.

As noted above, Tahoe-Sierra rejected the idea of a *per se* taking in the event of a moratorium writing, "In rejecting petitioner's *per se* rule, we do not hold that the temporary nature of a land-use restriction precludes finding that it effects a taking; we simply recognize that it should not be given exclusive significance one way or the other." Tahoe-Sierra, page 337. Instead, when applying the Fifth Amendment's Takings Clause [the case does not involve any State Constitution, nor State statutes, and North Dakota's Constitution and statutes provide for broader rights than the Constitution of the United States], there is a requirement for a Penn Central analysis to determine if the taking will be compensable. Penn Central notes the United States Supreme Court "has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons." Penn Central Transportation Company v. City of New York, 438 U.S. 104, 123 (1978). On the same page of the decision, Penn Central identifies three subject areas of inquiry for the essentially ad hoc factual inquiries to establish when public action be compensated by the government:

Factor 1. "The economic impact of the regulation on the claimant;"

Factor 2. "(T)he extent to which the regulation has interfered with distinct investment-backed expectations;" or

Factor 3. "(T)he character of the governmental action."

Under such an examination there can be no question that the taking in the instant case should be compensated by the City of Fargo. Not only was the governmental action in the form of a "moratorium on the issuance of all building permits for new construction in the floodway effective August 10, 1998," admitted in ¶ IV of the City of Fargo's Answer, but the City of Fargo sought to justify the action as a "valid exercise of its police power to regulate in the interest of public safety, health and welfare." City of Fargo's Answer, ¶ VIII.

How can it be a valid exercise of its police power to regulate in the interest of public safety, health and welfare if the interests of the public are not legitimately served – (a) the first two months of the moratorium did not result in any review or study that was used to create new ordinances applicable to the Plaintiff's real property [the new ordinances did not apply to Plaintiff's previously platted real property, nor were any other ordinances contemplated thereafter], and (b) the last 18-19 months of the moratorium [until a date following the City of Fargo's Answer] was used by the City of Fargo to prevent construction on Plaintiff's previously platted real property during an unsuccessfully attempt to secure Federal funding to purchase the Plaintiff's real property at a lower price [a price without need for just compensation for new construction]. It cannot be argued that the City of Fargo accomplished anything except stop Plaintiff dead in its tracks – unable to sell its property, unable to

utilize past marketing efforts, unable to build a "spec home," and unable to get the City of Fargo to lift the moratorium until after it commenced an "inverse condemnation" proceeding.

At this point, Plaintiff feels compelled to identify a major legal flaw in the trial court's analysis of the Penn Central factors. The trial court inappropriately engages in a balancing test with Factor 3 being weighed against Factors 1 & 2 ["Turning then to the Penn Central facts (sic), we must weigh 'the character of the governmental action' against 'the economic impact of the regulation on the claimant,' and particularly, the extent to which the regulation has interfered with distinct investment-backed expectations.' 438 U.S. 104 at 127." Memorandum Opinion, page 7.]. In actuality, the cited page does not contain any reference to such balancing test between the identified factors [nor does any other page of the Penn Central decision].

At page 127 of the Penn Central decision [438 U.S. 104 (1978)], the page referenced by the trial court, the United States Supreme Court is actually discussing two other cases – both articulating legal propositions seemingly inconsistent with the trial court's stated position [but consistent with Plaintiff's contentions].

At page 127 of the Penn Central decision, Goldblatt v. Hempstead, 369 U.S. 590 (1962) is cited as upholding a 1958 ordinance banning any excavation below the water table and effectively prohibiting the claimant from continuing a sand and gravel mining business operated since 1927.

However, the decision was predicated upon an assumption "that the ordinance did not prevent the owner's reasonable use of the property since the owner made no showing of an adverse effect on the value of the land. Because the restriction served a substantial public purpose, the Court thus held no taking had occurred."[5] The Supreme Court then stated what has been overlooked by the City of Fargo, "It is, of course, implicit in *Goldblatt* that a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose, see *Nectow v. Cambridge, supra;* cf. *Moore v. East Cleveland*, 431 U.S. 494, 513-514, 97 S.Ct. 1932, 1943, 52 L.Ed.2d 531 (1977)(STEVENS, J., concurring), or perhaps if it has an unduly harsh impact upon the owner's use of the property." In the instant case, there was no study or review that was done that would have affected Plaintiff's previously platted property, no ordinances were enacted that affected Plaintiff's previously platted property, and if the government's actions can be excused from August 10, 1998, until October 5, 1998, it cannot be constitutionally ever said that preventing development to keep the price down while awaiting Federal funds to buy the property is a legitimate or substantial public purpose.

The second case mentioned on page 127 of the Penn

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[5] In the instant case, despite attempts to do so, Plaintiff could not sell the land subject to the City of Fargo's moratorium, nor could it even build on the land for almost 21 months [until a date after the City of Fargo's Answer which still failed to plead abandonment of moratorium, and never thereafter was amended to so identify its position].

Central decision is Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) which was identified as being "the leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-back expectations as to amount to a 'taking.'" The claimant "had sold the surface rights to particular parcels of property, but expressly reserved the right to remove the coal thereunder. A Pennsylvania statute, enacted after the transactions, forbade any mining of coal that caused the subsidence of any house, unless the house was the property of the owner of the underlying coal and was more than 150 feet from the improved property of another. Because the statute made it commercially impracticable to mine the coal, (citation omitted) and thus had nearly the same effect as the complete destruction of rights claimant had reserved from the owners of the surface land (citation omitted), the Court held that the statute was invalid as effecting a 'taking' without just compensation." Again, change the names of the parties and Plaintiff will have suffered by the moratorium "nearly the same effect as the complete destruction of rights claimant (possessed)."

As mentioned within Penn Central, both Goldblatt or Mahon give support to Plaintiff's positions. In the instant case involving moratorium impacting Plaintiff, it can be stated unequivocally that (1) no substantial public purpose was served by the moratorium, and/or (2) the moratorium did not further any important public policies. This can be said without equivocation because the City of Fargo passed the moratorium without regard to the property rights of Plaintiff. The trial court errs as a matter of law and fact when it writes,

"(t)his was not an appropriation for public use, but rather a temporary moratorium until local, State and Federal officials could adequately review a flood plain management for the area so devastated by the 1997 flood. This is not a 'taking' under Penn Central." In the instant case, there was no review involving the Plaintiff's property. In fact, the evidence now shows that the ordinances passed on October 5, 1998, did not even apply to Plaintiff's property.

If it be true there was a review, the review determined on October 5, 1998, that the new ordinances for flood plain management would not apply to Plaintiff's real property – but the moratorium was continued for another 18 months while the City of Fargo waited in vain to get Federal monies to buy Plaintiff's platted land without the structures that would have resulted from new construction – an obvious attempt to keep the price down. Keeping the price down by stopping the building of structures on the platted lands – not subject to the new ordinances – will never be regarded as a legitimate public policy. Such action, if true, would be an intentional violation of the Constitution of the United States and the Constitution of North Dakota. Likewise, the whisper campaign and the City of Fargo's failure to identify the true circumstances of non-applicability of the new ordinances even until the time of trial dictates the trial court recognize an abuse of the regulatory powers of the City of Fargo by seeking to manipulate the price of land intended to be purchased – all at the suggestion of Cass County, North Dakota, another political subdivision of the State of North Dakota working with the City of Fargo. At best, the City of Fargo's explanation would merely change the date of taking

to October 5, 1998, but it would never eliminate the obligation for just compensation.

The discussion on causation and/or assessment of damages in the Memorandum Opinion is also irrelevant to a Penn Central determination. The motive(s) of the City of Fargo in enacting the moratorium is not one of the three factors [unless the City of Fargo's unlawful purpose of keeping the price down by preventing construction upon the platted lots can be regarded as pertinent under Factor 3, but it would only serve to condemn the actions of the City of Fargo for abuse of regulatory process], nor is the difficulty in assessing damages for the inverse condemnation a Penn Central factor. If the flood of 1997 had a negative impact upon development of Plaintiff's real property or even the value of Plaintiff's real property, the City of Fargo could have presented such evidence – it did not do so. The trial court's speculation can never achieve the status of evidence, but North Dakota case law recognizes the City of Fargo's failure of proof can achieve such status against the City of Fargo. There exists justification for invoking the "adverse inference" rule against the City of Fargo under a "rule of evidence provid(ing) that nonproduction of relevant evidence in the control of a party permits an inference that the evidence is unfavorable to that party's cause. (authority omitted) This rule is as much a matter of common sense and ordinary judgment as a rule of law. It has received recognition by this court." Colgate-Palmolive Company v. Dorgan, 225 N.W.2d 278, 281 (N.D. 1975). The City of Fargo never attempted to challenge any of the valuations placed upon the property; if it had evidence of reduced value

due to the 1997 floods, it failed to produce the same, and the trial court should not engage in speculation.

The facts of the instant case are clear as to what *stopped development* for almost 21 months, not "slowed" development, within Wild Rice River Estates [and even after the City of Fargo's Answer] – a City of Fargo building permit moratorium that resulted in two (2) Gaugler purchase agreements being terminated, and one (1) speculation home not being built by Plaintiff. The City of Fargo's moratorium had direct economic impact upon Plaintiff and its real property. It negated all of Plaintiff's prior marketing efforts, all attempts by Plaintiff to recover prior infrastructure expenses by sale of platted lots, all attempts to build its own "spec home" to spur other sales, and even 17.42% of its contract rights under the sewer agreement. The trial court's properly observed, in part,[6] "Although technically, Wild Rice

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[6] In the technical sense, any restraint on alienation is void under North Dakota law, so Plaintiff's real property could always be sold. N.D.C.C. § 47-02-26. Plaintiff's platted land was developed at great expense approximating $500,000 [without including the value of the land], and during the moratorium specific contracts for sale of individual lots were cancelled due to the purchasers inability to obtain a building permit from the City of Fargo. Even Plaintiff was denied a building permit for a "spec home" to be built to encourage the marketing efforts. Plaintiff's marketing efforts suffered total collapse of any opportunity for sale to others while the City of Fargo's moratorium prevented further development of the platted lands while it sought Federal funds to purchase Plaintiff's property at a lower price [without any new construction adding to the purchase price]. In addition, the trial court failed to note that Lots 2-12 of Block One, Lot 1 in Block Two, and Lots 1-4 in Block Three were also within the preliminary designated floodway.

River lots could be sold, it is not disputed that actual building on lots within the preliminary designated floodway, i.e. Lots 13-25, could not have gone forward during this 21-month period for the single reason that no building permit would issue." Memorandum Opinion, pages 4-5.

During the twenty (20) months and twenty (20) days of the moratorium, the City of Fargo did nothing except prevent any development and wait for the arrival of FEMA funds -- which never arrived. It also never advised Plaintiff, or the Court, that it was abandoning the moratorium which would still necessitate just compensation for the period of the temporary taking.

Should the trial court infer some study or review by the City of Fargo between August 10, 1998, and October 5, 1998, when the non-applicable ordinances were enacted, the City of Fargo *reaffirmed* its liability [an obligation to pay just compensation] by (a) failing to lift the moratorium on October 5, 1998, when it passed ordinances which it knew, or should have known, would never apply to areas platted prior to October 5, 1998, such as Wild Rice River Estates, (b) failing to respond to Plaintiff's demands for a building permit [and requests for building permits by others], and/or (c) failing to respond to the demands of Plaintiff, and others, that the moratorium be immediately lifted. Using the October 5, 1998, date as the date of taking merely changes the amount due Plaintiff by 55 days less interest.

* * *

Dated this 30th day of December, 2004.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Wild Rice River Estates, Inc.,

Plaintiff-Appellant,
Supreme Court No. 20050074

vs.

District Court No. 09-02-C-0703
City of Fargo, a municipal corporation,

Defendant-Appellee.

BRIEF OF APPELLANT

APPEAL FROM JUDGMENT OF DISMISSAL OF THE SAID DISTRICT COURT ENTERED ON DECEMBER 27, 2004, AND ORDER DENYING PLAINTIFF'S POST TRIAL MOTIONS DATED JANUARY 18, 2005

CASS COUNTY DISTRICT COURT,
EAST-CENTRAL JUDICIAL DISTRICT
HONORABLE DOUGLAS R. HERMAN

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* * *

ISSUES ON APPEAL

1. Has there been a regulatory taking of Wild Rice's property by the City of Fargo?

2. Did the City of Fargo's moratorium deny Wild Rice all economically viable use of its property?

3. If the City of Fargo's moratorium did not deny Wild Rice all economically viable use of its property, is Wild Rice entitled to just compensation for that which was taken?

4. Did the Answer of the City of Fargo suggest a permanent taking based upon its failure to give governmental notice of abandonment of the moratorium?

5. If failure to give notice of abandonment is excused,

does a governmental entity have to pay just compensation for the interim period between the moratorium and the date it is lifted?

6. What is the formula for determining just compensation?

7. Did the trial court improperly delegate judicial function which led to an abuse of process when concluding papers were prepared?

* * *

LAW AND ARGUMENT

Point 1. There has been a regulatory taking of Wild Rice's property by the City of Fargo.

The Supreme Court of the United States has identified two scenarios that result in compensable regulatory takings.

In Palazzolo v. Rhode Island, 533 U.S. 606, 617-618 (2001), the first scenario recognizes a compensable taking occurs when the regulation denies a landowner all economically viable use of his property. The second scenario provides for a potentially compensable taking when the regulation places limitations on land, but does not deny "all" economically viable use of the property. In the second scenario, a factual inquiry is made to determine the character of the government's action, and the regulation's effect upon investment backed expectations.

A. The first scenario - the moratorium denied Wild Rice all economically viable use of its property.

As stated by the United States Supreme Court in Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 (1992):

> We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking. [Lucas, at 1019]

As of August 10, 1998, the City of Fargo asked Wild Rice to sacrifice its Subdivision – for which just compensation is immediately due under the Federal standard announced in Lucas because Wild Rice was asked to leave real property it owned economically idle.

The documented facts of the case establish an original intent to prevent building, which was successful until the pre-determined triggering event to end the moratorium occurred – landowner litigation. See Facts ¶ 11-14; 17-25; 27.

When Wild Rice's land was left idle for almost 21 months there was a "taking." The issue to be then addressed is the amount of damages which also identifies the date damages are determined. See Point 3.

B. Second scenario - a factual inquiry as to whether the regulation is a "taking."

The United States Supreme Court issued another significant decision, Penn Central Transportation Company v. City of New York, 438 U.S. 104 (1978), which has been succinctly paraphrased in Berst v. Snohomish County, 57 P.3d 273, 279 (Wash. 2001) when less than "all economically beneficial uses" are taken:

> In *Penn Central*, the Supreme Court characterized previous takings analyses as "these essentially ad hoc, factual inquiries" in which the court considered several factors: the economic impact of the regulation on the claimant; the extent to which the regulation has interfered with distinct investment-backed expectations; and the character of the governmental action. [FN30]
>
> FN30. *Penn Central*, 438 U.S. at 124, 98 S.Ct. 2646.

The instant case meets all three (3) Penn Central standards, also requiring just compensation to Wild Rice. Each of the three requirements are hereafter discussed:

A. *The economic impact of the regulation on the claimant.*

The Statement of Facts is replete with references to

the impact of the August 10, 1998, moratorium upon Wild Rice. Wild Rice's evidence, seemingly uncontroverted, noted the loss of contracted time for access to the City of Fargo's sewer system [Fact ¶s 4, 6, 8], loss of lot sales [Fact ¶s 12, 13], and its inability to get a building permit for a spec home [Fact ¶ 19] – all due to Fargo's moratorium.

The City of Fargo identified the successful impact of its moratorium on October 28, 1999, in the Notice of Informational Meeting [App., p. 192] when it identified "(t)he purpose of the moratorium was to prevent building in areas that are flood-prone," followed by the recognized "Impacts":

> "1. No building has occurred in the moratorium area since August 10, 1998.
>
> 2. Property owners have expressed concern about the moratorium, claiming it to be unfair regulation with a resulting negative economic impact in preventing sale of and construction on these lots.
>
> Exhibits G, H, & I are letters from impacted property owners."[7]

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[7] Exhibit H, attached to Plaintiff's Exhibit 129, is the August 25, 1999, letter written by counsel for Wild Rice. App., p. 208-210.

The impact upon Wild Rice was recognized by City Engineer Bittner in Fact ¶s 14, 18, 20, 22, and 25, and even City Attorney Stewart's comments noted in Fact ¶ 25 recognize that Wild Rice was an "impacted property owner()."

The undisputed evidence discloses Wild Rice's economic investment between 1992 and 1999 of approximately $492,112 [without consideration of the original land acquisition costs or interest on a construction mortgage]. Fact ¶ 6. Wild Rice's development costs were mandated by the governmental entities – including the City of Fargo – that insisted upon the public sewer system and road infrastructure [including road dedication without compensation] that cost approximately $300,000 [which, upon construction pursuant to approved plans and specifications, became the property of the governmental entity] which provided for only a ten (10) year right of hook-up access to the public sewer system.

The City of Fargo's moratorium eliminated the possibility of sales for almost two years, and then led everyone to believe the moratorium was lifted with the later-enacted October 5, 1998, ordinances applicable to all new construction at Wild Rice River Estates [and other areas].

The actions of the City of Fargo in enacting the moratorium, during the moratorium, and after the moratorium have had direct financial impact upon Wild Rice. During the moratorium, pending sale(s) of lots did not take place because the purchaser(s) were unable to obtain building

permits, Wild Rice itself was denied a building permit for a "spec home" to be constructed in Wild Rice River Estates, and Anton Rutten had to borrow money and sell other land to keep everything afloat [a fact developed by the City of Fargo; Tr., ps. 363-368].

B. *The extent to which the regulation has interfered with distinct investment-backed expectations.*

The discussion set forth above also establishes the extent to which the regulation interfered with Wild Rice's distinct investment-backed expectations – sales of residential lots predicated upon an investment greater than $500,000.

The City of Fargo made no attempt to argue that Wild Rice was not financially impacted by the issuance of the moratorium effective August 10, 1998, or its actions thereafter. There is no evidence of an economically viable use of Wild Rice's land during the moratorium. Neither the City of Fargo, nor the trial court, ever identified an economically viable use of Wild Rice's land during the moratorium. See Facts ¶ 30.

C. *The character of the governmental action.*

The City of Fargo, to protect its citizens, imposed a building moratorium upon Wild Rice's real property.

The purpose of the building moratorium – to prevent building – was accomplished. Rather than conduct any

studies, Fargo used the time to seek FEMA funding knowing that it would have to pay, and deciding to lift the moratorium only after impacted landowners bring suit under inverse condemnation proceedings. See Fact ¶s 17, 18, 20, 21, 23, 24, 25, and 27.

Under N.D.C.C. § 32-15-23, the right to compensation accrues on the date of the taking [and the actual value on that date]. There exists substantial evidence that the actions of the City of Fargo were the result of deliberations involving representatives of Cass County, North Dakota, and were done with knowledge that liability to the impacted landowners would exist.

Even if the initial actions of the City of Fargo were originally not deliberately impacting private landowners, the City of Fargo would still be charged with knowledge of the law, including, in this case, the broader protections of the North Dakota Constitution. Gonzalez v. Tounjian, 2003 ND 121, ¶ 20, 665 N.W.2d 705. After the City of Fargo was informed by Wild Rice [and other impacted private landowners] of the adverse effects of the moratorium, the City of Fargo continued to maintain the moratorium -- even after it became clear that the long-awaited FEMA funds were not coming and the FIRM panel would not be timely approved by FEMA. Even in lifting the moratorium, the City of Fargo hid the lack of effect of the October 5, 1998, ordinances upon pre-platted subdivisions such as Wild Rice River Estates so that new construction was done according to stricter constructions standards. See Fact ¶ 15.

The City of Fargo, its agents or representatives, have not acted honorably giving rise to "just compensation" pursuant to law. The City of Fargo has acted under color of right, when it had to know that its actions were wrong.

Buegel v. City of Grand Forks, 475 N.W.2d 133, 135 (N.D. 1991) provides:

> "If, however, the regulation forbids all reasonable use of the regulated property the property owner may be compensated through an inverse condemnation action. *E.g., Rippley v. City of Lincoln*, 330 N.W.2d 505 (N.D.1983). As a further exception to the rule of no compensation, this court has recognized that 'a landowner who has made substantial expenditures in reliance upon existing zoning or otherwise committed himself to his substantial disadvantage before the zoning change may be protected.' *City of Fargo v. Harwood Twp.*, 256 N.W.2d 694, 700 (N.D.1977). It is this latter exception that the trial court used to impose liability upon the City by applying a species of estoppel. We agree that the 'substantial reliance' exception is essentially an exception grounded on the doctrine of estoppel."

In this case there is undisputed evidence of substantial expenditure by Wild Rice for subsequent sale of the Wild Rice's lots as residential lots. Due to a moratorium imposed

by the City of Fargo, Wild Rice's real property was left without any economically viable use. During the time a moratorium was imposed, Wild Rice could not sell its real property for its intended use because its potential buyers could not get a building permit.

614 Co. v. Minneapolis Community Development, 547 N.W.2d 400, 407 (Minn.App.1996) approved a cause of action when the government's action "left appellant without economically viable rental and development uses." Not even the City of Fargo has argued, or presented evidence of, any viable rental or development uses available to Wild Rice during the moratorium, in the process impliedly recognizing the real property value as platted land to be sold for construction of new homes – nothing else. It is this use of the property that was stopped for almost 21 months – for no substantial reason because the new ordinances did not apply [ever] and it would be an abuse of regulatory authority to attempt to freeze the price of Wild Rice's property without proper exercise of eminent domain proceedings.

In Goldblatt v. Hempstead, 369 U.S. 590, 594-595 (1962) the term was described:

> The term 'police power' connotes the time-tested conceptional limit of public encroachment upon private interests. Except for the substitution of the familiar standard of 'reasonableness,' this Court has generally refrained from announcing any specific criteria. The classic statement of the rule in

Lawton v. Steele, 152 U.S. 133, 137, 14 S.Ct. 499, 501, 38 L.Ed. 385 (1894), is still valid today:

> 'To justify the state in * * * interposing its authority in behalf of the public, it must appear--First, that the interests of the public * * * require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.'

The moratorium cannot be regarded as a legitimate exercise of police power because the interests of the public were not legitimately served – (a) the first two months of the moratorium did not result in any review or study that was used to create new ordinances applicable to the Wild Rice's real property [the new ordinances did not apply to Wild Rice's previously platted real property, nor were any other ordinances contemplated thereafter], and (b) the last 18-19 months of the moratorium [until a date following the City of Fargo's Answer] was used by the City of Fargo to prevent construction on Wild Rice's previously platted real property during an unsuccessful attempt to secure Federal funding to purchase Wild Rice's real property at a lower price [a price without need for compensation for new construction].

* * *

Point 3. If the City of Fargo is not bound by Rippley's notification rule, a temporary taking still requires just compensation for the interim period between the moratorium and the date it is lifted – as a matter of law.

A. North Dakota has already adopted a requirement for just compensation when moratoriums are abandoned.

Should the City of Fargo be excused for its failure to properly give notice of its abandonment of the moratorium, Rippley still requires just compensation be paid to Wild Rice for the "temporary taking measured by the time period between the date the regulation took effect and the date it was rescinded." Rippley v. City of Lincoln, 330 N.W.2d 505, 511 (N.D. 1983).

The trial court has mistakenly confused legal terms. The trial court believed that "inverse condemnation" is equated with "a total or permanent taking." Memorandum Opinion, page 6; App., p. 257. An "inverse condemnation" action can also be predicated upon a temporary taking. In footnote 2 of San Diego Gas & Electric Company v. City of San Diego, 450 U.S. 621 (1981), the United States Supreme Court identified the nature of an inverse condemnation as "generally describ(ing) a cause of action against a government defendant in which a landowner may recover just compensation for a "taking" of his property under the Fifth Amendment, even though formal condemnation proceedings

in exercise of the sovereign's power of eminent domain have not been instituted by the government entity. (cases cited). .. In an 'inverse condemnation' action, the condemnation is 'inverse' because it is the landowner, not the government entity, who institutes the proceeding."

As is clear by Rippley, the government has the sole right to determine if the taking will be a "permanent taking" or a "temporary taking." Whether a "condemnation" proceeding or an "eminent domain" proceeding [instituted by the government] or an "inverse condemnation" proceeding [instituted by the landowner], the government will pay for the taking whether it be temporary or permanent [the time period determined by the action of the government if possible to halt the taking].

The trial court was obviously mistaken about the nature of an inverse condemnation proceeding so there exists error as a matter of law, and any findings induced by an erroneous conception of the law is clearly erroneous. Bolinske v. Herd, 2004 ND 217, ¶ 7, 689 N.W.2d 397.

As a matter of law [without regard to the City of Fargo's failure of pleading "abandonment of moratorium"], a temporary taking has occurred for which Wild Rice is entitled to just compensation for twenty-months and twenty days under the existing broader property rights under North Dakota standards. Braunnagel v. City of Devils Lake, 2001 ND 118, 629 N.W.2d 567; Grand Forks-Traill Water Users v. Hjelle, 413 N.W.2d 344 (N.D. 1987).

B. North Dakota has already adopted a formula for determining just compensation when moratoriums are abandoned by the government as authorized by Ripley.

Damages to be awarded involve N.D.C.C. Chap. 32-15 and N.D.C.C. Chap. 32-03. Eminent domain cases are predicated upon a contract of constitutional dimensions between the government and its citizens, not tortious conduct by the government. Damages are predicated upon ascertaining and assessing "(t)he value of the property sought to be condemned and all improvements thereon pertaining to the realty and of each and every separate estate or interest therein." N.D.C.C. § 32-15-22(1). The right to damages accrues "at the date of the taking and its actual value at that date shall be the measure of compensation for property actually to be taken .." N.D.C.C. § 32-15-23. There exists no statutory distinction for determining damages predicated upon a "temporary" taking as compared to a "permanent" taking in any case the value of the interest taken by the government will be determined as of the date of the taking.

Wild Rice is entitled to damages. If a permanent taking is established, the damages will exceed $999,300. Fact ¶ 28. If a temporary taking is established, the damages will be either (a) $103,325.83 predicated upon the unchallenged value of the real property at the statutory interest rate of 6% [N.D.C.C. § 47-14-05] for 629 days of the moratorium, (b) a greater amount due to accruing interest on the $103,325.83 until paid [plus attorney fees and costs in either case], and/or (c) an award for loss of 17.42% of the

term of the sewer contract.

C. Even if North Dakota had not already adopted a requirement for just compensation when moratoriums are abandoned, so that the issue was presented for the first time, Tahoe-Sierra and Penn Central would dictate the same result.

The City of Fargo, and the Court's Memorandum Opinion, seeks *unavailable legal solace* in Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302 (2002) which posed the singular question at the onset of the opinion:

> The question presented is whether a moratorium on development imposed during the process of devising a comprehensive land-use plan constitutes a *per se* taking of property requiring compensation under the Takings Clause of the United States Constitution.

Ultimately the United States Supreme Court determined no such *per se* rule existed, but in the process, the Supreme Court also outlined the procedure by which just compensation is determined in regulatory takings when application of only the Constitution of the United States is appropriate [as compared to our broader property rights in North Dakota].

First, Tahoe-Sierra reaffirmed the "categorical rule that (the United States Supreme Court) applied in *Lucas* (which) states that compensation is required when a regulation deprives an owner of '*all* economically beneficial uses' of his land." Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 330 (2002) [and later on the same page, "the permanent 'obliteration of the value' of a fee simple estate constitutes a categorical taking .."]. This is the first reason that Tahoe-Sierra provides no legal solace for the City of Fargo – the moratorium categorically deprived the owner of the property from "all economically beneficial uses of his land" for almost twenty-one months during the moratorium.

Next, Tahoe-Sierra identified seven (7) possible moratoria theories of takings, but addressed only the three (3) theories actually presented in the petition for certiorari which led to the Tahoe-Sierra decision [the other four theories being still undecided by the United States Supreme Court].[8]

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[8] Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 333 (2002) identifies the seven theories for just compensation for moratoria, which the undersigned paraphrases as follows: (1) categorical rule that "compensation is required whenever government temporarily deprives an owner of all economically viable use of her property;" (2) narrower rule that covers "all temporary land-use restrictions except those 'normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like;" (3) rule allowing for "short fixed period for deliberation .. without compensation say maximum one year after which the just compensation requirements would 'kick in;" (4) successive actions are "'series of rolling moratoria' that were the functional equivalent of a permanent taking;" (5) agency stall to avoid other actions; (6) moratoria

Finally, Tahoe-Sierra, at page 342, determines, "'fairness and justice' will be best served by relying on the familiar *Penn Central* approach when deciding (moratoria) cases like this, rather than by attempting to craft a new categorical rule." Applying the *Penn Central* approach dictates just compensation under the criteria earlier referenced in Berst v. Snohomish County, 57 P.3d 273, 279 (Wash. 2001).

Tahoe-Sierra [at page 337] rejected the idea of a *per se* taking in the event of a moratorium ["(W)e do not hold that the temporary nature of a land-use restriction precludes finding that it effects a taking; we simply recognize that it should not be given exclusive significance one way or the other."] Instead, when applying the Fifth Amendment's Takings Clause [North Dakota's Constitution and statutes provide for broader rights than the Constitution of the United States; Braunnagel v. City of Devils Lake, 2001 ND 118, 629 N.W.2d 567], there is still a requirement for a Penn Central analysis to determine if the taking will be compensable. Penn Central notes the United States Supreme Court "has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few

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does not "substantially advance a legitimate state interest;" and (7) necessity to challenge the application of the moratoria to their individual parcels so as to allow a *Penn Central* analysis. Tahoe-Sierra did not address theories (4), (5), (6), or (7), but all seven theories are being presented in the instant case by pleadings and or facts.

persons." Penn Central Transportation Company v. City of New York, 438 U.S. 104, 123 (1978). However, it still requires the ad hoc factual inquiry into the three subject areas earlier referenced.

Under such an examination there can be no question that the taking in the instant case should be compensated by the City of Fargo. The City of Fargo admitted the governmental action by enactment of a moratorium on August 10, 1998. [¶ IV of the City of Fargo's Answer; App., p. 26], and sought to justify the action as a "valid exercise of its police power to regulate in the interest of public safety, health and welfare." App., p. 27.

By so pleading the legitimate character of the governmental action, damages were mandated because of "the economic impact of the regulation on the claimant; (and) the extent to which the regulation has interfered with distinct investment-backed expectations ..." Penn Central, at 124.

If the governmental actions were illegitimate – seeking to prevent building without adhering to constitutional and statutory standards – just compensation is still due Wild Rice as noted in its inverse condemnation action. It cannot be said to be a legitimate or valid exercise of a city's police power to regulate in the interest of public safety, health and welfare when the interests of the public are not legitimately served – (a) the first two months of the moratorium did not result in any review or study that was used to create new ordinances applicable to the Wild Rice's real property, and (b) the last 18-19 months of the moratorium was used by the

City of Fargo to prevent construction on Wild Rice's previously platted real property during an unsuccessfully attempt to secure Federal funding to purchase the Wild Rice's real property at a lower price. It cannot be argued that the City of Fargo accomplished anything except stop Wild Rice dead in its tracks – unable to sell its property, unable to utilize past marketing efforts, unable to build a "spec home," and unable to get the City of Fargo to lift the moratorium until after it commenced an "inverse condemnation" proceeding.

Contrary to the assertion of the trial court, the Penn Central factors do not result in a balancing test. App., p. 258. The trial court inappropriately engaged in a balancing test with Factor 3 being weighed against Factors 1 & 2 ["Turning then to the Penn Central facts (sic), we must weigh 'the character of the governmental action' against 'the economic impact of the regulation on the claimant,' and particularly, the extent to which the regulation has interfered with distinct investment-backed expectations.' 438 U.S. 104 at 127." Memorandum Opinion, page 7.]. In actuality, neither the cited page, nor any other page of the Penn Central decision references to such balancing test between the identified factors. The actual page referenced by the trial court discusses two other cases both articulating legal propositions seemingly inconsistent with the trial court's stated position, but consistent with Wild Rice's contentions.

At page 127 of the Penn Central decision, Goldblatt v. Hempstead, 369 U.S. 590 (1962) is cited as upholding a 1958 ordinance banning any excavation below the water table

and effectively prohibiting the claimant from continuing a sand and gravel mining business operated since 1927. However, the decision was predicated upon an assumption "that the ordinance did not prevent the owner's reasonable use of the property since the owner made no showing of an adverse effect on the value of the land. Because the restriction served a substantial public purpose, the Court thus held no taking had occurred."[9] The Supreme Court then stated what has been overlooked by the City of Fargo and the trial court, "It is, of course, implicit in *Goldblatt* that a use restriction on real property may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose, see *Nectow v. Cambridge, supra;* cf. *Moore v. East Cleveland*, 431 U.S. 494, 513-514, 97 S.Ct. 1932, 1943, 52 L.Ed.2d 531 (1977)(STEVENS, J., concurring), or perhaps if it has an unduly harsh impact upon the owner's use of the property." In the instant case, there was no study or review affecting Wild Rice's previously platted property, no ordinances were enacted that affected Wild Rice's previously platted property, and if the government's actions can be excused from August 10, 1998, until October 5, 1998, it cannot be constitutionally ever said that preventing development to keep the price down while awaiting Federal funds to buy the property is a legitimate or substantial public purpose.

The second case mentioned on page 127 of the Penn

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[9] In the instant case, despite attempts to do so, Wild Rice could not sell the land subject to the City of Fargo's moratorium, nor could it even build on the land for almost 21 months.

Central decision is Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) which was identified as being "the leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-back expectations as to amount to a 'taking.'" The claimant "had sold the surface rights to particular parcels of property, but expressly reserved the right to remove the coal thereunder. A Pennsylvania statute, enacted after the transactions, forbade any mining of coal that caused the subsidence of any house, unless the house was the property of the owner of the underlying coal and was more than 150 feet from the improved property of another. Because the statute made it commercially impracticable to mine the coal, (citation omitted) and thus had nearly the same effect as the complete destruction of rights claimant had reserved from the owners of the surface land (citation omitted), the Court held that the statute was invalid as effecting a 'taking' without just compensation." Wild Rice asserts that the moratorium had "nearly the same effect as the complete destruction of rights claimant (possessed)."

Both cases mentioned within Penn Central give support to Wild Rice's positions. It can be stated unequivocally that (1) no substantial public purpose was served by the moratorium, and/or (2) the moratorium did not further any important public policies, because the City of Fargo passed the moratorium without regard to the property rights of Wild Rice.

The trial court errs as a matter of law and fact when it writes, "(t)his was not an appropriation for public use, but

rather a temporary moratorium until local, State and Federal officials could adequately review a flood plain management for the area so devastated by the 1997 flood. This is not a 'taking' under Penn Central." There is no evidence of a review involving the Wild Rice's property. The evidence now shows that the ordinances passed on October 5, 1998, did not even apply to Wild Rice's property.

The taking had to have occurred, and it had to be regarded as permanent until the City plead abandonment under Rippley.

If it be true there was a review by the City of Fargo, the review determined on October 5, 1998, that the new ordinances for flood plain management would not apply to Wild Rice's real property. Continuance of the moratorium for another 18 months while the City of Fargo waited in vain to get FEMA monies to buy Wild Rice's platted land [without the structures resulting from new construction] is an obvious attempt to keep the price down, and cannot be regarded as a legitimate public policy. Such action, if true, would be an intentional violation of the Constitution of the United States and the Constitution of North Dakota unless the government is willing to pay just compensation, and deposit the money pursuant to law. The City of Fargo's failure to identify the true circumstances of non-applicability of the new ordinances, even until the time of trial, dictates the trial court should have recognized an abuse of the regulatory powers of the City of Fargo by seeking to manipulate the price of land intended to be purchased [at the suggestion of Cass County, North Dakota]. At best, the City of Fargo's

explanation would merely change the date of taking to October 5, 1998, but it would never eliminate the obligation for just compensation – whether permanent, or temporary.

The motive(s) of the City of Fargo in enacting the moratorium is not one of the three Penn Central factors [unless considered an adverse factor when considering the "character of the governmental action." Penn Central, at page 124, nor is it important in North Dakota {Kinnischtzke v. City of Glen Ullin, 57 N.W.2d 588, 599 (N.D. 1953)}], nor is the difficulty in assessing damages for the inverse condemnation a Penn Central factor. If the flood of 1997 had a negative impact upon development of Wild Rice's real property or even the value of Wild Rice's real property, the City of Fargo could have presented such evidence – it did not do so. The trial court should not have engaged in speculation as to value. App., p. 257. The trial court's speculation can never achieve the status of evidence, but North Dakota case law recognizes the City of Fargo's failure of proof can achieve such status against the City of Fargo under the "adverse inference" rule. Colgate-Palmolive Company v. Dorgan, 225 N.W.2d 278, 281 (N.D. 1975).

The City of Fargo *stopped development* for almost 21 months within the Subdivision. The moratorium had direct economic impact upon Wild Rice, negating expenditures in excess of $500,000 and even eliminating contractual sewer rights. The impact was even recognized by the trial court's proper observation, in part, "Although technically, Wild Rice River lots could be sold, it is not disputed that actual building on lots within the preliminary designated floodway, i.e. Lots

13-25, could not have gone forward during this 21-month period for the single reason that no building permit would issue." Memorandum Opinion, pages 4-5; App., p. 255-256.

Just compensation is due Wild Rice, and the trial court erred as a matter of law.

* * *

Respectfully submitted this 10th day of May, 2005.

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App. 110

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Wild Rice River Estates, Inc.,

Plaintiff-Appellant,

Supreme Court No. 20050074

vs.

District Court No. 09-02-C-0703

City of Fargo, a municipal corporation,

Defendant-Appellee.

REPLY BRIEF OF APPELLANT

APPEAL FROM JUDGMENT OF DISMISSAL OF THE SAID DISTRICT COURT ENTERED ON DECEMBER 27, 2004, AND ORDER DENYING PLAINTIFF'S POST TRIAL MOTIONS DATED JANUARY 18, 2005

CASS COUNTY DISTRICT COURT,
EAST-CENTRAL JUDICIAL DISTRICT
HONORABLE DOUGLAS R. HERMAN

GARAAS LAW FIRM

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* * *

LAW AND ARGUMENT

There Has Been a Regulatory Taking

The City packages its actions as being a proper exercise of its police power. Brief of City, Issue I, pages vi; "D. Application of Penn Central – Fargo's Moratorium Was A Proper Exercise of Police Power," repeated at page 23. In the process, the City overlooks the impact of Lingle v. Chevron, 544 U.S. ___, 125 S.Ct. 2074 (2005), a copy attached as an Addendum.

In City of Minot v. Gronna, 59 N.W.2d 514, 698-699 (N.D. 1953) one finds "police power" "is the power inherent in a government to enact laws, within constitutional limits, to promote the order, safety, health, morals, and general welfare of society" but "there is no such thing as a police power which is above the Constitution, or which justifies any

violation of express or manifestly implied constitutional prohibitions." [emphasis added]

The City's good intentions does not cancel its obligation to pay just compensation required by two different Constitutions for any regulatory taking.

The City does not dispute that the City's moratorium denied Wild Rice all economical use of its property, only asserting it was temporary – only 21 months – so it is not a *per se* taking, and that "the proper test to apply in moratorium cases is application of the standards set forth in Penn Central, 438 U.S. at 124. Tahoe-Sierra, 535 U.S. at 342; see also Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001)." City's Brief, page 18. Such argument concedes Judge Herman erred – instead of applying the three standards of Penn Central, he turned them into a balancing test pitting each standard against the others, and erroneously determining there was no taking – even temporarily. There had to have been a taking – a temporary taking, or a taking made permanent by the City's failure to plead abandonment.

The legitimate exercise of "police power" argument, always advanced by the City, confuses a due process taking with an eminent domain taking. The claim of right based upon "police power" is an attempt to invoke the Agins test ["a regulation of private property 'effects a taking if [it] does not substantially advance [a] legitimate state interes[t].'"] Lingle, at p. 2087. Conversely, there is no taking under Agins if the government action substantially advances a legitimate state interest.

Lingle rejects the need to examine the governmental action in takings jurisprudence. "But such a test is not a valid method of discerning whether private property has been 'taken' for purposes of the Fifth Amendment." Lingle, Part II(B); p. 2084. The Supreme Court states in Lingle, at page 2087:

> Today we correct course. We hold that the "substantially advances" formula is not a valid takings test, and indeed conclude that it has no proper place in our takings jurisprudence. In so doing, we reaffirm that a plaintiff seeking to challenge a government regulation as an uncompensated taking of private property may proceed under one of the other theories discussed above– by alleging a "physical" taking, a *Lucas*-type "total regulatory taking," a *Penn Central* taking, or a land-use exaction violating the standards set forth in *Nollan* and *Dolan*.

An understanding of Lingle is imperative. Wild Rice will restrict its comments to the second and third type of government action discussed in Lingle – regulatory takings. Pennsylvania Coal Co. V. Mahon, 260 U.S. 393 (1922), established that some government regulation of private property may be so onerous that its effect is tantamount to a direct appropriation or ouster –and that such "regulatory takings" may be compensable under the Fifth Amendment. Lingle, p. 2081.

According to Lingle [p. 2081], regulatory takings will break down into two types: (1) *per se* takings; and (2) non-*per se* takings. *Per se* takings, which then break down into two categories, are predicated upon regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." Lingle, Part II(A); p. 2080-2082. The first *per se* taking arises when the government requires an owner to suffer a permanent physical invasion of her property-however minor-it must provide just compensation. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). Lingle, p. 2081.

The second *per se* taking arises in the instant case, when regulations completely deprive an owner of "*all* economically beneficial us[e]" of her property. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 (1992). Lingle, p. 2081.

The government must pay just compensation for "total regulatory takings" [subject to other law restricting the owner's intended use of the property]. Lingle, p. 2081. In the instant case, Wild Rice lost "all economically beneficial use" of its property until after it initiated an action in inverse condemnation to uphold its Constitutional right to just compensation. No evidence of any other possible economically beneficial use of the property was presented, nor does it exist. N.D.C.C. § 32-15-23 fixes the date of the taking, and the City did not comply with Rippley's mandated obligation to plead the lifting of the moratorium.

If not a *per se* taking, the non-*per se* takings cases will then provide for just compensation to Wild Rice. Lingle makes clear, that other "regulatory takings challenges are governed by the standards set forth in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 .. (1978)." Lingle, p. 2081.

The standards applied to all non-*per se* taking cases is set forth in Penn Central, but there is no "set formula" for evaluating regulatory takings claims. The following factors "have particular significance" [without ever providing for any balancing test]: (a) the economic impact of the regulation on the claimant; (b) the extent to which the regulation has interfered with distinct investment-backed expectations; and (c) the character of the government action [for instance whether it amounts to a physical invasion or merely affects property interests through "some public program adjusting the benefits and burdens of economic life to promote the common good."] Lingle, ps 2081-2082. Interestingly, the City erroneously abbreviates this third standard [disregarding the physical invasion scenario] and turns it solely into a balancing test using paraphrase with words that do not originally appear. City Brief, page 26, citing Penn Central, 438 U.S. at 124. What "public program" exists that would suggest it is a proper government function to stop development, and freeze the price while the City, acting at the direction and with the cooperation of Cass County, seeks FEMA monies to buy Wild Rice's previously

developed land?[10]

In Lingle, the United States Supreme Court makes clear the good intentions of the government have no place in the discussion – "government regulation-by definition-involves the adjustment of rights for the public good." Lingle, p. 2081, citing Andrus v. Allard, 444 U.S. 51, 65 (1979). Nor is the effectiveness of the government action important, as Lingle, at ps. 2083-2084, rejects a means-end test in achieving some legitimate public purpose.

Lingle, in Part II(B), rejects the "substantially advances" inquiry which probes the regulation's underlying validity, instead of properly "addressing a challenged regulation's effect on private property." Lingle, p. 2084. The City improperly asserts "police power" as a means justifying any action without regard to the effect upon Wild Rice. Lingle continues, "But such an inquiry is logically prior to and distinct from the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose." Lingle, p. 2084. The Supreme Court recognizes "(t)he [Fifth Amendment] Clause expressly requires compensation where government takes private property '*for public use*.' It does not bar government from interfering with property rights, but rather requires compensation 'in the event of *otherwise proper interference* amounting to a taking.'" Lingle, p. 2084.

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[10] Justice Kennedy notes the holding "does not foreclose the possibility that a regulation might be so arbitrary or irrational as to violate due process." Lingle, p. 2087.

* * *

Respectfully submitted this 22nd day of June, 2005.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Wild Rice River Estates, Inc.,

Plaintiff-Appellant,

Supreme Court No. 20050074

vs. District Court No. 09-02-C-0703

City of Fargo, a municipal corporation,

Defendant-Appellee.

PETITION FOR REHEARING

APPEAL FROM JUDGMENT OF DISMISSAL OF
THE SAID DISTRICT COURT ENTERED
ON DECEMBER 27, 2004, AND ORDER
DENYING PLAINTIFF'S POST TRIAL
MOTIONS DATED JANUARY 18, 2005

CASS COUNTY DISTRICT COURT,
EAST-CENTRAL JUDICIAL DISTRICT
HONORABLE DOUGLAS R. HERMAN

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* * *

Petitioner Wild Rice River Estates, Inc., [hereinafter "Wild Rice"] respectfully petitions this Court for a rehearing on the following grounds:

Ground 1. The City of Fargo's moratorium was a regulation that went "too far" and is, as a matter of law, a Fifth Amendment compensable taking.

This Court errs when it relies upon the trial court's *conclusion* - not a factual finding as inferred - that the City of Fargo's "officials acted in good faith and with proper diligence concerning the moratorium as part of an overall scheme to maintain the status quo until flood planning efforts an efforts could be re-evaluated after the devastating flood." See, Trial Court's Conclusion of Law 18 at Appendix page 273 [and referenced at Wild Rice River Estates, Inc. v. City of Fargo, 2005 ND 193, ¶ 23 and ¶ 26, __ N.W.2d __].

The moratorium denying the issuing of building permits that affected Wild Rice's subdivided land was put in place on August 10, 1998. By October 5, 1998 [less than sixty days later] the City of Fargo adopted the only

ordinances that stemmed or were related to the moratorium – said ordinances did not apply to Wild Rice's land. [11] The Trial Court's *conclusion* that the City of Fargo acted in good faith cannot be extended to any date beyond October 5, 1998 - the date of the ordinances.

After October 5, 1998 there were no "development" studies. After October 5, 1998, the only reason the City of Fargo continued the moratorium was to give the City of Fargo, working hand-in-hand with Cass County, North Dakota, time to explore acquisition of Wild Rice's land using FEMA funding. Appendix pages 102, 124, 132, 226, 248. Transcript pages 441- 446. After October 5, 1998, the purpose of the moratorium was to stop development and thereby freeze the purchase price if the City of Fargo [or Cass County, North Dakota] obtained FEMA funds. As testified to by City Engineer Bittner, in response to questions by the attorney for the City of Fargo, "(T)his continued to be an ongoing process and we are attempting to use the best available information to prevent construction on properties that will ultimately require public money to get rid of." Transcript, page 559.

By purposeful design and plan, the City of Fargo continued the moratorium until after Wild Rice initiated an inverse condemnation action against it. The City of Fargo's planned termination date of its moratorium on issuance of building permits was predicated upon the onset of litigation

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[11] The City of Fargo's October 5, 1998, ordinance *did not apply* to Wild Rice River Estates because it had been previously platted. Tr., ps. 425, 432-436, 447, 487-491 617-618.

by landowners – a landowner was required to seek judicial relief before the City of Fargo would stop its unconstitutional act.[12]

The above undisputed facts establish the City of Fargo's purpose for continuing the moratorium after October 1998 was "bad faith" – as a matter of law – and its continuance was a *per se* taking. Under the above undisputed facts, the moratorium should be viewed as a compensable taking under the Fifth Amendment of the Constitution of United States of America, applicable to North Dakota under the Fourteenth Amendment of the Constitution of the United States of America.

These facts establish a "bad faith" taking claim. Stalling development to freeze the potential purchase price does not serve a legitimate public purpose, and should be considered a compensable taking under the Fifth Amendment and Fourteenth Amendment. See Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 119 S.Ct. 1624, 143 L.Ed.2d 882 (1999).

As was stated in State ex rel. Tingley v. Gurda, 243

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[12] Tr., p. 507-508; see also, p. 465-468; Exhibit 107; App., p. 132. See also, Exhibit 164, App., p. 251, where the Floodway Building Moratorium Meeting Summary of November 19, 1999, states: "(City Attorney) Gary Stewart indicated that he had not received further correspondence from legal counsel for impacted property owners. Gary indicated that he felt that the City was making efforts to resolve the issue, which is the appropriate action until/if legal action is brought as a result of the building moratorium." The only thing then being done was the City's continued quest for FEMA funding.

N.W. 317, 320 (Wis. 1932):

> The zoning power is one which may be used to the great benefit and advantage of a city, but, * * * it is a power which may be greatly abused if it is to be used as a means to depress the values of property which the city may upon some future occasion desire to take under the power of eminent domain. Such a use of the power is utterly unreasonable, and cannot be sanctioned.

As was stated in Hermanson v Board of County Commissioners of the County of Freemont, 594 P.2d 694, 695-696 (Colo. App. 1979):

> While it is true that the use of property may be regulated by valid exercise of the police power, if the regulation goes beyond protection of the public health, safety, morals, and welfare it amounts to a confiscation or taking and is subject to the constitutional mandate requiring payment of just compensation. Therefore, regulations designed to depress value with a view to future acquisition may form the basis of a cause of action for compensation on the theory of inverse condemnation against the public entity initiating the regulation. See, e. g., People ex rel. Department of Public Works v. Southern Pacific Transportation Co., 33 Cal.App.3d 960, 109 Cal.Rptr. 525 (1973).

See also, People ex rel. Department of Public Works v. Southern Pacific Transportation Co., 33 Cal.App.3d 960, 109 Cal.Rptr. 525 (1973); Wital Corp. v. Township of Denville, 93 N.J.Super. 107, 225 A.2d 139 (1966); and Carl M. Freeman Assocs., Inc. v. State Roads Common, 252 Md. 319, 250 A.2d 250, 255 (1969).

This Court's opinion erroneously sanctions a confiscation of property by the City of Fargo by imposing a moratorium designed solely [without any question after October 5, 1998, when the only ordinances proposed or passed had no application to Wild Rice's land] to suppress development, and thereby freeze the purchase price.

Ground 2. The North Dakota Supreme Court misreads cited cases – which then improperly excuses a Fifth Amendment compensable taking.

The Wild Rice decision encourages governmental disregard for the Constitutions of the United States and North Dakota and the laws of North Dakota; and implicitly overrules prior North Dakota Supreme Court decisions and is inconsistent with United State Supreme Court decisions – all based upon a misreading of other cases.

While discussing Wild Rice's investment-backed expectations – which discussion by the Supreme Court necessarily concedes that Wild Rice had investment-backed expectations – the Supreme Court cites two cases as authority for the following statement in Wild Rice River Estates, Inc. v. City of Fargo, 2005 ND 193, ¶ 25, ___ N.W.2d. ___:

[¶ 25] Moreover, courts have said the focus

> of the economic impact criterion is the change in fair market value of the subject property caused by the regulatory imposition measured by comparing the market value of the property immediately before the governmental action with the market value of the same property immediately after the action is terminated. *See, e.g., Cane Tennessee, Inc. V. United States*, 57 Fed.Cl. 115, 123 (Fed.Cl.2003); *Leon County v. Gluesenkamp;* 873 So.2d 460, 467 (Fla.App.2004).

The Supreme Court's error is that neither cited case has made such statement – words have been mistakenly added that significantly change the meaning of the legal concepts advanced by shifting the time of comparison to almost twenty-one months later.

Wild Rice's land had no value upon passage of the moratorium – there is no evidence that the property had any economic viable use during the duration of the moratorium of nearly 21 months. It could not be farmed, nor even used as pasture. It could not be sold, and it could not be developed for nearly 21 months while the City of Fargo waited for FEMA monies, and initiation of legal action by adversely impacted landowner(s) when the moratorium was designed to be terminated.

The Supreme Court has mistakenly added two words ["is terminated"] at the end of the language originally set forth in Cane Tennessee, Inc. v. United States, 57 Fed.Cl. 115, 123 (Fed.CL.2003):

> The court believes that the proper measure of economic impact is a comparison of the market value of the property immediately before the governmental action with the market value of that same property immediately after the action. *See Keystone*, 480 U.S. at 497, 107 S.Ct. 1232.

Likewise, the other cited case, Leon County v. Gluesenkamp, 873 So.2d 460, 467 (Fla.App.2004) does not have the two extra words ["is terminated"] which shifted the point of comparison to a date 21 months later:

> With respect to the *Penn Central* economic impact criterion, a plaintiff must establish "'a serious financial loss from the regulatory imposition.'" (cases cited) The focus of this factor is on the change in fair market value of the subject property caused by the regulatory imposition. *Id.* In other words, the court must compare the value that has been taken from the property with the value that remains in the property. *Id.* (citing *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987)); *see also Cane Tenn., Inc. v. United States*, 57 Fed. Cl. 115, 123 (Fed.Cl.2003)(holding that the proper measure of economic impact is a comparison of the market value of the property immediately before the governmental action with that same property immediately after the action).

The Supreme Court's decision suggests no harm has occurred because "Wild Rice sold more lots at higher prices after the moratorium was lifted than it did before the moratorium became effective. The most recent lot sale reflected in the record was for $59,900, more than double the $24,000 Wild Rice received for a lot in 1994." Wild Rice River Estates, Inc. v. City of Fargo, 2005 ND 193, ¶ 25, ___ N.W.2d. ___ .

Adding the two words ["is terminated"] suggests that the initial action of the City of Fargo [creating a moratorium] somehow postpones any consideration of an inverse condemnation action until after the moratorium is terminated, at which time a comparison in prices shall occur; and apparently, if the price of land goes up – no harm, no foul.

However, neither cited case includes the two added words, nor the concept that compresses time and makes different dates possibly synonymous: either August 10, 1998 [moratorium created] or October 5, 1998 [inapplicable ordinances passed], and May 1, 2000 [moratorium terminated].

Nor does Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497, 107 S.Ct. 1232, 94 L.Ed.2d 472 (1987), the authority for both Cane Tennessee and Leon County, render passage of time meaningless [even a ten year moratorium would be totally excused if the price of land goes up] by including the two extra words.

Just as significantly, the Wild Rice decision disregards N.D.C.C. § 32-15-23 [and also, N.D.C.C. § 32-15-22 establishing the method of assessing damages]

establishing the right to damages that "shall be deemed to have accrued at the date of the taking and its actual value at that date shall be the measure of compensation for all property actually to be taken, and the basis of damages to the property not actually taken, but injuriously affected."

The decision impliedly overrules City of Devils Lake v. Davis, 480 N.W.2d 720, 723 (N.D. 1992) explicitly recognizing the statutory language makes reference to one date – the date of the taking, not some later date(s) resulting from judicial time-shifting or time-compression. It also implicitly overrules Hultberg v. Hjelle, 286 N.W.2d 448 (N.D. 1979) which also recognizes that statutorily in North Dakota, compensation and damages in an eminent domain action are determined from the "date of the taking."

To eliminate any further question that a single day's governmental event is important, and that the Supreme Court errs by judicially compressing 21 months into one single action by inclusion of the two extra words, Wild Rice directs the Supreme Court's attention to another case impliedly overruled, Donaldson v. City of Bismarck, 3 N.W.2d 808, 818 (N.D. 1942), and its Constitutional underpinnings recognized by five decisions of the United States Supreme Court, which identifies damages as Constitutionally arising in an "instant," *plus additional interest* on the original damages:

> Under the mandate of the Constitution, the owner is entitled to be paid "just compensation" before his property is taken or damaged. Where the property is taken or damaged without the owner's consent and

without the legal exercise of the power of eminent domain, the owner becomes entitled to just compensation for the value of the property that has been taken or the amount of damage that has been inflicted the instant the property is taken or damaged. In such case, payment at some future time of the value of the property at the time it was taken, or the amount of the damage determined as of the time it was inflicted, does not constitute the just compensation which the Constitution requires to be paid to the owner. Just compensation, in such case, should include in addition to the value of the property at the time of the taking, or the amount of the damage at the time of its infliction, such additional amount as may be required to pay the full equivalent of the value or of the damage, as the case may be, paid contemporaneously with the taking or the damaging. Ordinarily, "interest at a proper rate is a good measure by which to ascertain the amount so to be added." Seaboard Air Line R. Co. v. United States, 261 U.S. 299, 43 S.Ct. 354, 356, 67 L.Ed. 664; Jacobs v. United States, 290 U.S. 13, 54 S.Ct. 26, 78 L.Ed. 142, 96 A.L.R. 1; United States v. Creek Nation, 295 U.S. 103, 55 S.Ct. 681, 79 L.Ed. 1331; Shoshone Tribe v. United States, 299 U.S. 476, 57 S.Ct. 244, 81 L.Ed. 360; United States v. Klamath and Moadoc Tribes, 304 U.S. 119, 58 S.Ct. 799, 82 L.Ed. 1219; (State citations omitted).

The City of Fargo's Answer, signed and served prior to the lifting of the moratorium, is evidence of the "bad faith" of a governmental body. The City of Fargo may have abandoned its ill-conceived governmental action that sought to prevent development and freeze the price, but the Constitution says it still must pay for the time that it took the property of another.

CONCLUSION

Wild Rice respectfully petitions this Court for a rehearing or issuance of a new opinion consistent with the relief sought by Wild Rice based upon the Constitution of the United States of America.

Respectfully submitted this 28th day of November, 2005.

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Trial testimony of
City of Fargo's Engineer, Mark Bittner,
of October 26, 2004
Transcript of Court Trial, Volume III,
page 558, line 3 to page 559, line 7

Q. (MS. ROSCOE CONTINUING) Before the '97 flood happened, you knew that there were going to be problems with flooding, correct?

A. That's correct.

Q. Could you have imagined it was as bad as it turned out to be?

A. I couldn't have imagined, nor could many, many people that came into my office and seen the red dots I had placed on the map indicating that they should be purchased, listening to them cry in my office and saying they didn't want to move, but knew that they had no choice but to move, and that government needs to take action when appropriate. Yes, it is an ongoing activity and we need to base our decisions on the best available information.

And you need to look at the aerial photos of the 1997 flood and say, hey, this just doesn't make any sense to put yourself in a position that the only way you can get in and out of your house for six weeks at a time is through – from a boat, and that you have no sewer and that you have no water and that you have no fire protection and that you have no --

no ambulance protection.

And it just didn't make sense to continue to build in those areas when two years previous we had had the flood of the century. And FEMA was saying that that wasn't a hundred-year event. It wasn't a 250-year event that everybody was claiming it to be. It was less than a hundred-year event, and so, yeah, I was -- this continued to be an ongoing process and we are attempting to use the best available information to prevent construction on properties that will ultimately require public money to get rid of.

Floodway Building Moratorium
Meeting Summary

Date:	10:00 AM, Friday, November 19, 1999	
Location:	Engineering Conference Room – Fargo City Hall	
Attendees:	Pat Zavoral	Dennis Walaker
	Gary Stewart	Mark Bittner
	Jim Gilmour	Keith Berndt

Summary:

* * *

Gary Stewart indicated that he had not received further correspondence from legal counsel for impacted property owners. Gary indicated that he felt that the City was making efforts to resolve the issue, which is the appropriate action until/if legal action is brought as a result of the building moratorium.

* * *

Fighting the Flood
1997

* * *

Created by the
City of Fargo

* * *

Additional Mitigation Projects

City engineer Mark Bittner commented that there was probably more work to do after the event than during the floodfight itself, for officials involved in cost recovery and planning for future flood mitigation. With acquisition and removal of flood-prone properties the city's top mitigation priority, Bittner and others also began developing other post-flood mitigation projects. These included recommendations for the installation of new lift stations, storm sewer improvements, building code changes, and evaluation of future options for permanent dikes.

* * *